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TRANSCRIPT OF RECORD**

Supreme Court of the United States

OCTOBER TERM, 1942

No. 300

**HOWARD S. PALMER, HENRY B. SAWYER AND
JAMES LEE LOOMIS, AS TRUSTEES FOR THE
NEW YORK, NEW HAVEN AND HARTFORD
RAILROAD COMPANY, PETITIONERS,**

vs.

**HOWARD F. HOFFMAN, INDIVIDUALLY AND AS
ADMINISTRATOR OF THE GOODS, CHATTELS
AND CREDITS WHICH WERE OF INEZ HOFF-
MAN, ALSO KNOWN AS INEZ T. SPRAKER HOFF-
MAN, DECEASED**

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE SECOND CIRCUIT**

PETITION FOR CERTIORARI FILED AUGUST 13, 1942.

CERTIORARI GRANTED OCTOBER 12, 1942.

SUPREME COURT OF THE UNITED STATES

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**IN UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT**

HOWARD F. HOFFMAN, individually and as Administrator of the goods, chattels and credits which were of **INEZ HOFFMAN**, also known as **INEZ T. SPRAKER HOFFMAN**, deceased, Plaintiff-Appellee,

against

HOWARD S. PALMER, **HENRY B. SAWYER** and **JAMES LEE LOOMIS**, as Trustees for The New York, New Haven and Hartford Railroad Company, Defendants-Appellants.

STATEMENT UNDER RULE XIII

This action was commenced in the United States District Court for the Eastern District of New York by the service of a summons and complaint on July 18th, 1941. Issue was joined by the service of defendants' answer on August 1st, 1941. Hulda Hoffman was originally joined as a co-plaintiff in the action, suing for property damage, and stipulated to discontinue her action against the defendants herein on September 15th, 1941.

Plaintiff served stipulation, dated September 15th, 1941, amending paragraphs First and Second of her complaint herein.

The action came on for trial before Judge Matthew T. Abruzzo and a jury on November 10th, 12th, 13th, 17th, 18th and 19th, 1941, and resulted in a verdict in favor of Howard [fol. 2] F. Hoffman, individually, in amount of \$25,000., and in favor of Howard F. Hoffman, as Administrator of the goods, chattels and credits which were of Inez Hoffman, also known as Inez T. Spraker Hoffman, deceased, in amount of \$9,000.

Defendants' motion to set aside the verdict and for a new trial was denied on November 19th, 1941.

Judgment in amount of \$25,077.35 in favor of the plaintiff, Howard F. Hoffman, individually, and \$9,000. in favor of Howard F. Hoffman, as Administrator of the goods, chattels and credits which were of Inez Hoffman, also known as Inez T. Spraker Hoffman, deceased, was entered on November 25th, 1941.

Defendants filed notice of appeal to the United States Circuit Court of Appeals for the Second Circuit on February 20th, 1942.

Plaintiff's attorney is Benjamin Diamond, 1542 Flatbush Avenue, Brooklyn, New York.

Defendants' attorney is Edward R. Brumley, Room 3841, Grand Central Terminal, New York City.

There has been no change of parties or attorneys other than herein indicated since the commencement of this action.

[fol. 3] IN DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NEW YORK, CIVIL DIVISION, Civil Action File No. 2161.

HOWARD F. HOFFMAN, individually and as Administrator of the goods, chattels and credits which were of INER HOFFMAN, also known as INER T. SPRAKER HOFFMAN, deceased and HULDA HOFFMAN, Plaintiffs,

against

HOWARD S. PALMER, HENRY B. SAWYER and JAMES LEE LOOMIS, as Trustees for The New York, New Haven and Hartford Railroad Company, Defendants.

SUMMONS—July 17, 1941

To the above named Defendants:

You are hereby summoned and required to serve upon Benjamin Diamond plaintiff's attorney, whose address is 1542 Flatbush Avenue, Brooklyn, New York, an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Percy G. B. Gilkes, Clerk of Court. John R. Scott, Jr., Deputy Clerk. Date: July 17th, 1941. (Seal of Court.)

[fol. 4] IN UNITED STATES DISTRICT COURT

COMPLAINT

The plaintiffs by Benjamin Diamond, their attorney, complaining of the defendants, respectfully allege:

For a first cause of action on behalf of Howard F. Hoffman:

First: That the plaintiff, Howard F. Hoffman and Hilda Hoffman, are citizens of the United States and residents of the Borough of Brooklyn, County of Kings, City and State of New York, which is within the jurisdiction of the United States District Court, Eastern District of New York.

Second: That upon information and belief, the defendant is a railroad corporation duly organized and existing under and by virtue of the laws of the State of Connecticut and maintained its principal office in the City of New Haven, State of Connecticut and a branch office in the City of New York, State of New York, and operates passenger and freight trains through the State of Connecticut and the State of Massachusetts.

Third: That heretofore and on the 30th day of June, 1941, by an order dated the 30th day of June, 1941, Hon. Carroll C. Hincks, United States District Judge, in the matter entitled, "United States District Court, District of Connecticut. In the Matter of the New York, New Haven and Hartford Railroad Company, Reorganization Proceedings No. 16562" granted leave to this plaintiff "to institute an action in Tort against the defendants, Howard S. Palmer, Henry [fol. 5] B. Sawyer and James Lee Loomis, as Trustees for the New York, New Haven and Hartford Railroad Company, for personal injuries sustained by him on December 23th, 1940 at Elkey-Buckley crossing on the Route No. 41 in the Town or Village of West Stockbridge, State of Massachusetts," and also as Administrator of the goods, chattels and credits which were of Inez Hoffman, also known as Inez T. Spraker Hoffman, Deceased, "to institute an action in Tort against Howard S. Palmer, Henry B. Sawyer and James Lee Loomis, as Trustees for the New York, New Haven and Hartford Railroad Company, for the wrongful death of his wife, Inez T. Hoffman, now deceased."

Fourth: That at all of the times hereinafter mentioned, the said defendants, maintained, managed, operated and controlled a steam railroad, through a certain municipality, town or village, known as West Stockbridge, in the State of Massachusetts.

Fifth: That prior to and at all the times hereinafter mentioned, a highway commonly known as Route No. 41

in the municipality, town or village of West Stockbridge, State of Massachusetts was a public highway.

Sixth: That prior to and at all of the times hereinafter mentioned, the railroad tracks and railroad, owned, operated, managed and controlled by the defendants crossed upon the same level with the said public way or traveled place known as Highway No. 41, commonly called Elkey-Buckley Crossing.

Seventh: That on the 25th day of December, 1940 at about 6:15 P. M. in the evening of that day, the defendants, its agents, servants and employees, operated and controlled a railroad engine bearing No. 438, and hauling a rail borne car known as a caboose over its tracks and upon the cross-[fol. 6] ing over the highway heretofore described as Elkey-Buckley Crossing or Route No. 41.

Eighth: That on the 25th day of December, 1940 at 6:15 P. M. in the evening of that day, while the plaintiff, Howard F. Hoffman, was lawfully and properly driving in a Ford Coupe bearing license plate No. 2X361—1940 over, across and upon the defendants' said tracks at the grade crossing hereinbefore set forth, the said auto was struck by a locomotive engine No. 438 owned, operated and controlled by the defendants and causing the plaintiff to sustain the injuries hereinafter set forth.

Ninth: That the plaintiff, Howard F. Hoffman, was rendered unconscious and confined to a hospital for a long period of time. That he suffered a compound comminuted fracture of the right leg which was distorted between the knee and femur with a piece of bone protruding through the flesh and his clothing; comminuted fracture of the left femur; laceration of the head anterior to the left ear about 5 inches long; laceration of the left upper eye lid about 2 inches long; laceration under the left side of chin about one inch long; and contusions and lacerations of the left knee; a puncture of about 2 inches in diameter about the right femur; concussion of the brain with subdural hemorrhage and traumatic shock. That as a result of the injuries hereinbefore set forth plaintiff was placed in splints, and casts, in and about both of his legs and body and a steel plate inserted in the femur of his left leg which still remains and upon information and belief will permanently remain in his said left femur and by virtue of his said injuries plaintiff was

sick, sore and disabled, suffered great pain, and will continue to be sick, sore and disabled and will suffer great pain, and did suffer severe shock to his entire body and central nervous system some of which said injuries will be permanent.

[fol. 7] Tenth: That Sec. 138 of Chapter 160 of the General Laws of the Commonwealth of Massachusetts, Tercenary Edition, 1932, provides as follows:

"Every railroad corporation shall cause a bell of at least 35 lbs. in weight, and a steam whistle, to be placed on each locomotive engine passing upon its railroad; and such bell shall be rung or at least three separate and distinct blasts of such whistle sounded at the distance of at least 80 rods from the place where the railroad crosses upon the same level any public way or travelled place over which a signboard is required to be maintained as provided in sections 140 and 141; and such bell shall be rung or such whistle sounded continuously or alternately until the engine has crossed such way or traveled place. This section shall not affect the authority conferred upon the department by the following section."

Eleventh: That Section 140 of Chapter 160 of the General Laws of the Commonwealth of Massachusetts, Tercenary Edition, 1932, provides as follows:

"Every Railroad Corporation shall cause boards, supported by posts or otherwise at such height as to be easily seen by travelers, and not obstructing travel, containing on each side in capital letters at least 9 inches long the following inscription:

RAILROAD CROSSING—LOOK OUT FOR THE ENGINE

to be placed and constantly maintained across each public way where it is crossed by the Railroad at the same level; or the Corporation may substitute therefor warning boards on each side of the crossing, of such form, size and description as the department approves."

[fol. 8] Twelfth: That Section 15 of Chapter 90 of the General Laws of the Commonwealth of Massachusetts, Tercenary Edition, 1932, provides as follows:

"Every person operating a motor vehicle, upon approaching a railroad crossing at grade, shall reduce the

speed of the vehicle to a reasonable and proper rate and shall proceed cautiously over the crossing. Whoever violates any provision of this section shall be punished by a fine of not less than \$10 nor more than \$50."

Thirteenth: That Section 85 of Chapter 231 of the General Laws of the Commonwealth of Massachusetts, Tercentenary Edition, 1932, provides as follows:

"In all actions, civil or criminal, to recover damages for injuries to the person or property or for causing the death of a person, the person injured or killed shall be presumed to have been in the exercise of due care, and contributory negligence on his part shall be an affirmative defense to be set up in the answer and proved by the defendant."

Fourteenth: That the aforesaid injuries sustained by the plaintiff were caused and occasioned by the failure and negligence of the defendants, their agents, servants and employees, to ring the said bell on the locomotive engine No. 438, at the distance of at least 80 rods from the place where the said Railroad crossed upon the same level with the aforementioned highway and the failure and negligence of the defendants, their agents, servants and employees, to give warning of the approach of the engine by blasts of any steam whistle on the said engine No. 438 and by the failure of the defendants to ring such bell or sound such whistle continuously or alternately until the engine had crossed the public highway heretofore mentioned.

[fol. 9] Fifteenth: That the plaintiff while driving said Ford Coupe hereinbefore mentioned and immediately prior to the accident, upon approaching the aforementioned crossing at grade, did reduce the speed of his motor vehicle to a reasonable and proper rate and did thereafter stop, look, and listen and did then proceed cautiously over the crossing and that the said accident did occur wholly and solely through the negligence and failure of the defendants, their agents, servants, and employees to perform the necessary acts as set forth in Section 138, Chapter 160 of the General Laws of the Commonwealth of Massachusetts, Tercentenary Edition, 1932, as hereinbefore mentioned in Paragraph "Tenth" of plaintiff's complaint.

Sixteenth: That the plaintiff herein is by profession a graduate civil engineer and at the time of the accident herein described was engaged as a construction engineer. That as a result of the said accident said plaintiff lost his employment and his wages thereof and will continue to be so unemployed for a long period of time.

Seventeenth: That as a result of his injuries said plaintiff has incurred expenses for physicians and surgeons, for hospitalization, nurses and medicines, and will continue to incur such expenses for a long period of time to come.

Eighteenth: That as a result of the said accident, plaintiff, Howard F. Hoffman, has been damaged in the sum of One Hundred Fifty Thousand and 00/100 (\$150,000.00) Dollars.

For a second cause of action the plaintiff, Howard F. Hoffman, respectfully alleges:

Nineteenth: The plaintiff repeats, reiterates and re-alleges all of the allegations as contained in Paragraphs [fol. 10] numbered "First" to "Ninth" inclusive and Paragraphs numbered "Fifteenth", "Sixteenth", "Seventeenth" and "Eighteenth" inclusive of plaintiff's complaint with the same full force and effect as if fully set forth herein.

Twentieth: That the aforesaid injuries sustained by the plaintiff were caused and occasioned by the failure and negligence of the defendants, their agents, servants and employees, in that it ran the said locomotive and the cars attached thereto at a high and unlawful rate of speed at a place where it knew that special care should be exercised and in failing to keep a proper and vigilant lookout and in failing to observe the automobile which plaintiff was driving and in failing to check the speed or to apply the brakes of said locomotive and cars attached, and failed and neglected to give any notice or warning of the approach of said locomotive or train by sounding any warning whistle or ringing any bell; that defendant was further negligent in failing to maintain a warning bell signal at the said crossing so as to warn plaintiff of the approach of the said locomotive or train and failed and neglected to erect, maintain and operate safety gates at said crossing or to main-

tain a flagman or watchman at said crossing and in failing and neglecting to erect, maintain and operate signal or warning lights to warn plaintiff of the approach of said locomotive; and the failure and neglect to sound any whistles or bells and the failure and neglect to erect, maintain and operate safety gates, and flagman, or watchman at said crossing and the failure and neglect to operate signal or warning lights at said crossing constituted an invitation to plaintiff to approach, proceed to and cross over the said tracks at the time of said accident, and that, by reason of the defendants' failure and negligence as aforesaid, plaintiff was unaware of the approach of the said locomotive and train; that the defendant was further [fol. 11] negligent and careless in view of the dangerous construction and contour of the tracks and of the right-of-way at the said crossing which dangerous condition was known to defendants at the time of the accident which occurred while said crossing was covered by pitch darkness in that it operated the locomotive in an unusual and dangerous manner so that the locomotive was proceeding with its headlights or warning beam shining in a direction away from the crossing and opposite the direction in which it was proceeding so that its light did not illuminate the crossing to warn plaintiff of its approach all of which was known to defendants, its agents, servants and employees; that it failed and neglected to maintain and operate any pilot light or headlight on the rear end of the locomotive which was proceeding to the crossing so that plaintiff could be warned of the approach of the train, all of which constituted negligent and reckless conduct on the part of the defendant, its agents, servants and employees, in view of the dangerous nature of the crossing, and further negligent in that the fireman and engineer failed to maintain a reasonable lookout and exercise reasonable vigilance at a time when the engine was proceeding "backwards" and approaching a crossing where defendants knowingly failed to maintain a flagman, gateman, or operate safety gates or mechanical signal device; and that in the exercise of reasonable care, the fireman should have discovered the presence of plaintiff's automobile crossing the tracks and should have known and recognized the danger of collision and should have given the engineer prompt warning of the presence of the automobile on the said tracks and that timely warning to the engineer by the fireman would have

given ample time and distance to have brought the train to a stop and the defendant had ample time and could have brought said train to a stop before it struck said automobile and defendant could have avoided the accident had the [fol. 12] said fireman exercised reasonable care, and that the said accident was caused wholly and solely by the aforesaid negligence of the defendants, its agents, servants and employees.

Twenty-first: That as a result of the said accident plaintiff has been damaged in the sum of One Hundred Fifty Thousand & 00/100 (\$150,000.00) Dollars.

For a third cause of action the plaintiff, Howard F. Hoffman, on behalf of Howard F. Hoffman, as administrator of the goods, chattels and credits which were of Inez Hoffman, deceased, respectfully alleges:

Twenty-second: That plaintiff repeats, reiterates and realleges all of the allegations as contained in paragraphs numbered "First", "Second", "Third", "Fourth", "Fifth", "Sixth", "Seventh", "Tenth", "Eleventh", "Twelfth", "Thirteenth" and "Fifteenth" of plaintiff's complaint with the same full force and effect as if fully set forth herein.

Twenty-third: That heretofore and on the 10th day of August, 1940, the plaintiff, Howard F. Hoffman, and Inez Hoffman, now deceased, were intermarried in the City of Cooperstown, State of New York, and lived together as husband and wife.

Twenty-fourth: That heretofore and on or about the 27th day of May, 1941, the plaintiff, Howard F. Hoffman, was duly appointed Administrator of the goods, chattels and credits which were of Inez Hoffman, also known as Inez T. Spraker Hoffman, now deceased, by the Surrogate's Court of the County of Kings, State of New York, and that said Letters of Administration are in full force and effect and have not been revoked.

Twenty-fifth: That at all of the times hereinafter mentioned, the decedent was a passenger in a certain Ford [fol. 13] Coupe bearing license plate No. 2X361—1940, operated and controlled by the plaintiff, Howard F. Hoffman, and owned by the plaintiff, Hulda Hoffman.

Twenty-sixth: That on the 25th day of December, 1940 at 6:15 P. M. o'clock in the evening of that day, while the plaintiff, Howard F. Hoffman, was lawfully and properly driving in the said Ford Coupe bearing license plate No. 2X361—Year 1940, over, across and upon the defendants' said tracks at the grade crossing hereinbefore set forth, the said automobile was struck by a locomotive engine No. 438 owned, operated and controlled by the defendants causing the said Inez Hoffman to sustain injuries resulting in her death.

Twenty-seventh: That the aforesaid injuries resulting in the death of the said Inez Hoffman were caused and occasioned by the failure and negligence of the defendants, their agents, servants and employees, to ring the said bell on the locomotive engine No. 438, at the distance of at least 80 rods from the place where the said Railroad crossed upon the same level with the aforementioned highway and the failure and negligence of the defendants, their agents, servants and employees, to give warning of the approach of the engine by blasts of any steam whistle on the said engine No. 438 and by the failure of the defendants to ring such bell or sound such whistle continuously or alternately until the engine had crossed the public highway heretofore mentioned.

Twenty-eighth: That Section 3 of Chapter 229 of the General Laws of the Commonwealth of Massachusetts, Tercentenary Edition, 1932, provides as follows:

"If a corporation operating a railroad, street railway or electric railroad, by reason of its negligence or of the unfitness or negligence of its agents or servants while engaged in its business causes the death of a passenger, or of a person in the exercise of due care who is not a passenger or in the employment of such corporation, it shall be punished by a fine of not less than five hundred nor more than ten thousand dollars, be recovered by an indictment prosecuted within one year after the time of the injury which caused the death, which shall be paid to the executor or administrator and distributed as provided in section one; but a corporation which operates a railroad shall not be so liable for the death of a person while walking or being upon its railroad contrary to law or to the reasonable rules and regulations of the corporation and

one which operates an electric railroad shall not be so liable for the death of a person while so walking or being on that part of its railroad not within the limits of a highway. Such corporation shall also be liable in damages in the sum of not less than five hundred nor more than ten thousand dollars, to be assessed with reference to the degree of culpability of the corporation or of its servants or agents which shall be recovered in an action of tort, begun within one year after the injury which caused the death, by the executor or administrator of the deceased and distributed as provided in section one."

Twenty-ninth: That the said Inez Hoffman is survived by her husband, Howard F. Hoffman, the plaintiff herein, her father, Rowan D. Spraker, and her mother, Inez T. Spraker.

Thirtieth: That as a result of the wrongful death of the said Inez Hoffman, due to the negligence of the defendants, its agents, servants and employees, the plaintiff, Howard [fol. 15] F. Hoffman, has been damaged in the sum of Ten Thousand & 00/100 (\$10,000.00) Dollars.

For a fourth cause of action the plaintiff, Howard F. Hoffman, on behalf of Howard F. Hoffman, as administrator of the goods, chattels and credits which were of Inez Hoffman, also known as Inez T. Spraker Hoffman, deceased, respectfully alleges:

Thirty-first: The plaintiff repeats, reiterates and realleges all of the allegations as contained in paragraphs numbered "First", "Second", "Third", "Fourth", "Fifth", "Sixth", "Seventh", "Fifteenth", "Twentieth", "Twenty-third", "Twenty-fourth", "Twenty-fifth", "Twenty-sixth", "Twenty-eighth", "Twenty-ninth" and "Thirtieth" of plaintiff's complaint with the same full force and effect as if fully set forth herein.

For a fifth cause of action the plaintiff, Hulda Hoffman, respectfully alleges:

Thirty-second: The plaintiff repeats, reiterates and realleges all of the allegations as contained in paragraphs numbered "First", "Second", "Third", "Fourth", "Fifth", "Sixth", "Seventh", "Eighth", "Tenth", "Eleventh", "Twelfth", "Thirteenth" and "Fifteenth",

of plaintiff's complaint with the same full force and effect as if fully set forth herein.

Thirty-third: That at all times hereinafter mentioned the plaintiff, Hulda Hoffman, was the owner of a certain Ford Coupe Automobile bearing license plate No. 2X361—Year 1940 and operated and controlled with her express knowledge and consent by the said plaintiff, Howard F. Hoffman.

[fol. 16] Thirty-fourth: That as a result of the said collision, the said automobile was totally destroyed and demolished and lost its value completely.

Thirty-fifth: That the reasonable value of the said automobile at the time of the said accident was the sum of seven hundred eighty-one & 00/100 (\$781.00) dollars in which amount plaintiff had been damaged.

For a sixth cause of action the plaintiff, Hulda Hoffman, respectfully alleges:

Thirty-sixth: The plaintiff repeats, reiterates and re-alleges all of the allegation as contained in paragraphs numbered "First", "Second", "Third", "Fourth", "Fifth", "Sixth", "Seventh", "Eighth", "Fifteenth", "Thirty-third", "Thirty-fourth" and "Thirty-fifth" of plaintiff's complaint with the same full force and effect as if fully set forth herein.

Thirty-seventh: That the aforesaid damage to the said plaintiff's automobile was caused and occasioned by the failure and negligence of the defendants, their agents, servants and employees, in that it ran the said locomotive and the cars attached thereto at a high and unlawful rate of speed at a place where it knew that special care should be exercised and in failing to keep a proper and vigilant lookout and in failing to observe the automobile which plaintiff was driving and in failing to check the speed or to apply the brakes of said locomotive and cars attached, and failed and neglected to give any notice or warning of the approach of said locomotive or train by sounding any warning whistle or ringing any bell; that defendant was further negligent in failing to maintain a warning bell signal at the said crossing so as to warn plaintiff of the approach of the said locomotive or train and failed and neglected to [fol. 17] erect, maintain and operate safety gates at said

crossing or to maintain a flagman or watchman at said crossing and in failing and neglecting to erect, maintain and operate signal or warning lights to warn plaintiff of the approach of said locomotive; and the failure and neglect to sound any whistles or bells and the failure and neglect to erect, maintain and operate safety gates, and flagman, or watchman at said crossing and the failure and neglect to operate signal or warning lights at said crossing constituted an invitation to plaintiff to approach, proceed to and cross over the said tracks at the time of said accident, and that, by reason of the defendants' failure and negligence as aforesaid, said plaintiff, Howard F. Hoffman, was unaware of the approach of the said locomotive and train; that the defendants were further negligent and careless in view of the dangerous construction and contour of the tracks and of the right-of-way at the said crossing which dangerous condition was known to defendants at the time of the accident which occurred while said crossing was covered by pitch darkness in that it operated the locomotive in an unusual and dangerous manner so that the locomotive was proceeding with its headlights or warning beam shining in a direction away from the crossing and opposite the direction in which it was proceeding so that its light did not illuminate the crossing to warn plaintiff, Howard F. Hoffman, of its approach all of which was known to defendants, its agents, servants and employees; that it failed and neglected to maintain and operate any pilot light or headlight on the rear end of the locomotive which was proceeding to the crossing so that plaintiff could be warned of the approach of the train, all of which constituted negligent and reckless conduct on the part of the defendants, its agents, servants and employees, in view of the dangerous nature [fol. 18] of the crossing, and further negligent in that the fireman and engineer failed to maintain a reasonable lookout and exercise reasonable vigilance at a time when the engine was proceeding "backwards" and approaching a crossing where defendants knowingly failed to maintain a flagman, gateman, or operate safety gates or mechanical signal device; and that in the exercise of reasonable care, the fireman should have discovered the presence of plaintiff's automobile crossing the tracks and should have known and recognized the danger of collision and should have given the engineer prompt warning of the presence of the

automobile on the said tracks and that timely warning to the engineer by the fireman would have given ample time and distance to have brought the train to a stop and the defendants had ample time and could have brought said train to a stop before it struck said automobile and defendants could have avoided the accident had the said fireman exercised reasonable care, and that the said accident was caused wholly and solely by the aforesaid negligence of the defendants, its agents, servants and employees.

Wherefore, the plaintiff, Howard F. Hoffman, demands judgment against the defendants in the sum of One Hundred Fifty Thousand & 00/100 (\$150,000.00) Dollars on his first cause of action; One Hundred Fifty Thousand & 00/100 (\$150,000.00) Dollars on his second cause of action, and as Administrator of the goods, chattels and credits which were of Inez Hoffman, also known as Inez T. Spraker Hoffman, deceased, the sum of Ten Thousand & 00/100 (\$10,000.00) Dollars on the third cause of action, and Ten Thousand & 00/100 (\$10,000.00) Dollars on the fourth cause of action; and the plaintiff, Hulda Hoffman, demands judgment in the sum of Seven Hundred Eighty-one & 00/100 (\$781.00) Dollars on the fifth cause of action, and the sum of Seven Hundred Eighty-one & 00/100 (\$781.00) Dollars on the sixth cause of action, together with the costs and disbursements of this action.

Benjamin Diamond, Attorney for Plaintiffs, Office & P. O. Address, 1542 Flatbush Avenue, Brooklyn, New York.

IN UNITED STATES DISTRICT COURT

ANSWER

The defendants above named, by their attorney, Edward R. Brumley, for their answer to the complaint herein.

To the first cause of action on behalf of Howard F. Hoffman:

First: Deny that they have any knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in paragraphs designated "First", "Ninth", "Sixteenth", "Seventeenth" and "Eighteenth" of the complaint herein.

Second: Admit that the New York, New Haven and Hartford Railroad Company is a railroad corporation duly organized and existing under and by virtue of the laws of the State of Connecticut and maintains its principal office in the City of New Haven, State of Connecticut, and a branch office in the City of New York, State of New York, as alleged in paragraph designated "Second" of the com-[fol. 20] plaint herein; and deny each and every other allegation contained in said paragraph designated "Second" of the complaint herein.

Third: Admit paragraphs "Third", "Fourth", "Fifth", "Sixth", "Seventh", "Tenth", "Eleventh", "Twelfth" and "Thirteenth" of the complaint herein.

Fourth: Admit that on the 25th day of December, 1940, at 6:15 P. M. in the evening of that day, while the plaintiff, Howard F. Hoffman, was driving in a Ford Coupe bearing license plate No. 2X361-1940 over, across and upon the defendants' said tracks at a grade crossing hereinafter set forth, he sustained injuries as alleged in paragraph designated "Eighth" of the complaint herein; and deny each and every other allegation contained in said paragraph designated "Eighth" of the complaint herein.

Fifth: Deny each and every allegation contained in paragraphs designated "Fourteenth" and "Fifteenth" of the complaint herein.

To the second cause of action of the plaintiff, Howard F. Hoffman:

First: Deny that they have any knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in paragraphs designated "First", "Ninth", "Sixteenth", "Seventeenth" and "Eighteenth", and which said paragraphs are repeated, reiterated and realleged in paragraph designated "Nineteenth" of the complaint herein.

Second: Admit that the New York, New Haven and Hartford Railroad Company is a railroad corporation duly [fol. 21] organized and existing under and by virtue of the laws of the State of Connecticut and maintains its principal office in the City of New Haven, State of Connecticut, and a branch office in the City of New York, State of New York,

as alleged in paragraph designated "Second" of the complaint herein; and deny each and every other allegation contained in said paragraph designated "Second" of the complaint herein, and which said paragraph is repeated, reiterated and realleged in paragraph designated "Nineteenth" of the complaint herein.

Third: Admit paragraphs "Third", "Fourth", "Fifth", "Sixth" and "Seventh" of the complaint herein, and which said paragraphs are repeated, reiterated and realleged in paragraph designated "Nineteenth" of the complaint herein.

Fourth: Admit that on the 25th day of December, 1940, at 6:15 p. m. in the evening of that day while the plaintiff, Howard F. Hoffman, was driving in a Ford Coupe bearing license plate No. 2X361-1940 over, across and upon the defendants' said tracks at the grade crossing hereinbefore set forth, he sustained injuries as alleged in paragraph designated "Eighth" of the complaint herein; and deny each and every other allegation contained in said paragraph designated "Eighth" of the complaint herein, said paragraph being repeated, reiterated and realleged in paragraph designated "Nineteenth" of the complaint herein.

Fifth: Deny each and every allegation contained in paragraph designated "Fifteenth" of the complaint herein, and which said paragraph is repeated, reiterated and realleged in paragraph designated "Nineteenth" of the complaint herein.

[fol. 22] Sixth: Deny each and every allegation contained in paragraph designated "Twentieth" of the complaint herein.

Seventh: Deny that they have any knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in paragraph designated "Twenty-first" of the complaint herein.

To the third cause of action of the plaintiff, Howard F. Hoffman, on behalf of Howard F. Hoffman as administrator of the goods, chattels and credits which were of Inez Hoffman, deceased:

First: Deny that they have any knowledge or information sufficient to form a belief as to the truth of any of the

allegations contained in paragraph designated "First" of the complaint herein, and which said paragraph is repeated, reiterated and realleged in paragraph "Twenty-second" of the complaint herein.

Second: Admit that the New York, New Haven and Hartford Railroad Company is a railroad corporation duly organized and existing under and by virtue of the laws of the State of Connecticut and maintains its principal office in the City of New Haven, State of Connecticut, and a branch office in the City of New York, State of New York, as alleged in paragraph designated "Second" of the complaint herein, and deny each and every other allegation contained in said paragraph designated "Second" of the complaint herein, and which said paragraph is repeated, reiterated and realleged in paragraph designated "Twenty-second" of the complaint herein.

Third: Admit paragraphs "Third", "Fourth", "Fifth", "Sixth", "Seventh", "Tenth", "Eleventh", "Twelfth" [fol. 23] and "Thirteenth" of the complaint herein, and which said paragraphs are repeated, reiterated and realleged in paragraph designated "Twenty-second" of the complaint herein.

Fourth: Deny each and every allegation contained in paragraph designated "Fifteenth" of the complaint herein, and which said paragraph is repeated, reiterated and realleged in paragraph designated "Twenty-second" of the complaint herein.

Fifth: Deny that they have any knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in paragraphs designated "Twenty-third", "Twenty-fourth", "Twenty-fifth" and "Twenty-ninth" of the complaint herein.

Sixth: Admit that on the 25th day of December, 1940, at 6:15 p. m. in the evening of that day, while the plaintiff, Howard F. Hoffman, was driving in a Ford Coupe bearing license plate No. 2X361-1940 over, across and upon the defendants' said tracks at a grade crossing hereinbefore set forth, the said Inez Hoffman sustained injuries resulting in her death as alleged in paragraph designated "Twenty-sixth" of the complaint herein; and deny each and every

other allegation contained in said paragraph designated "Twenty-sixth" of the complaint herein.

Seventh: Deny each and every allegation contained in paragraphs "Twenty-seventh" and "Thirtieth" of the complaint herein.

Eighth: Admit paragraph "Twenty-eighth" of the complaint herein.

[fol. 24] To the fourth cause of action of the plaintiff, Howard F. Hoffman, on behalf of Howard F. Hoffman as administrator of the goods, chattels and credits which were of Inez Hoffman, also known as Inez T. Spraker Hoffman, deceased:

First: Deny that they have any knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in paragraphs designated "First", "Twenty-third", "Twenty-fourth", "Twenty-fifth" and "Twenty-ninth" of the complaint herein, and which said paragraphs are repeated, reiterated and realleged in paragraph designated "Thirty-first" of the complaint herein.

Second: Admit that the New York, New Haven and Hartford Railroad Company is a railroad corporation duly organized and existing under and by virtue of the laws of the State of Connecticut and maintains its principal office in the City of New Haven, State of Connecticut, and a branch office in the City of New York, State of New York, as alleged in paragraph designated "Second" of the complaint herein; and deny each and every other allegation contained in said paragraph designated "Second" of the complaint herein, which said paragraph is repeated, reiterated and realleged in paragraph designated "Thirty-first" of the complaint herein.

Third: Admit paragraphs "Third", "Fourth", "Fifth", "Sixth", "Seventh" and "Twenty-eighth" of the complaint herein, and which said paragraphs are repeated, reiterated and realleged in paragraph designated "Thirty-first" of the complaint herein.

Fourth: Deny each and every allegation contained in paragraphs designated "Fifteenth", "Twentieth" and [fol. 25] thirtieth" of the complaint herein, which said

paragraphs are repeated, reiterated and realleged in paragraph designated "Thirty-first" of the complaint herein.

Fifth: Admit that on the 25th day of December, 1940, at 6:15 p. m. in the evening of that day, while the plaintiff, Howard F. Hoffman, was driving in a Ford Coupe bearing license plate No. 2X361-1940 over, across and upon the defendants' said tracks at a grade crossing hereinbefore set forth, said Inez Hoffman sustained injuries resulting in her death, as alleged in paragraph designated "Twenty-sixth" of the complaint herein; and deny each and every other allegation contained in said paragraph designated "Twenty-sixth" of the complaint herein, said paragraph being repeated, reiterated and realleged in paragraph designated "Thirty-first" of the complaint herein.

To the fifth cause of action of the plaintiff, Hulda Hoffman:

First: Deny that they have any knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in paragraph designated "First" of the complaint herein, and which said paragraph is repeated, reiterated and realleged in paragraph designated "Thirty-second" of the complaint herein.

Second: Admit that the New York, New Haven and Hartford Railroad Company is a railroad corporation duly organized and existing under and by virtue of the laws of the State of Connecticut and maintains its principal office in the City of New Haven, State of Connecticut, and a branch office in the City of New York, State of New York, as alleged in paragraph designated "Second" of the [fol. 26] complaint herein; and deny each and every other allegation contained in said paragraph designated "Second" of the complaint herein, and which said paragraph is repeated, reiterated and realleged in paragraph designated "Thirty-second" of the complaint herein.

Third: Admit the allegations contained in paragraphs designated "Third", "Fourth", "Fifth", "Sixth", "Seventh", "Tenth", "Eleventh", "Twelfth" and "Thirteenth" of the complaint herein, and which said para-

graphs are repeated, reiterated and realleged in paragraphs designated "Thirty-second" of the complaint herein.

Fourth: Admit that on the 25th day of December, 1940, at 6:15 P. M. in the evening of that day, while the plaintiff, Howard F. Hoffman, was driving in a Ford Coupe bearing license plate No. 2X361-1940 over, across and upon the defendants' said tracks at a grade crossing hereinbefore set forth, he sustained injuries as alleged in paragraph designated "Eighth" of the complaint herein; and deny each and every other allegation contained in said paragraph designated "Eighth" of the complaint herein, said paragraph being repeated, reiterated and realleged in paragraph designated "Thirty-second" of the complaint herein.

Fifth: Deny each and every allegation contained in paragraph designated "Fifteen" of the complaint herein, and which said paragraph is repeated, reiterated and realleged in paragraph designated "Thirty-second" of the complaint herein.

Sixth: Deny that they have any knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in paragraphs designated [fol. 27] "Thirty-third", "Thirty-fourth" and "Thirty-fifth" of the complaint herein.

To the sixth cause of action on behalf of the plaintiff Hulda Hoffman:

First: Deny that they have any knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in paragraphs designated "First", "Thirty-third", "Thirty-fourth" and "Thirty-fifth" of the complaint herein, and which said paragraphs are repeated, reiterated and realleged in paragraph designated "Thirty-sixth" of the complaint herein.

Second: Admit that the New York, New Haven and Hartford Railroad Company is a railroad corporation duly organized and existing under and by virtue of the laws of the State of Connecticut and maintains its principal office in the City of New Haven, State of Connecticut, and a branch office in the City of New York, State of New York, as alleged in paragraph designated "Second" of

the complaint herein; and deny each and every other allegation contained in said paragraph designated "Second" of the complaint herein, and which said paragraph is repeated, reiterated and realleged in paragraph designated "Thirty-sixth" of the complaint herein.

Third: Admit paragraphs "Third", "Fourth" "Fifth", "Sixth" and "Seventh" of the complaint herein, and which said paragraphs are repeated, reiterated and realleged in paragraph designated "Thirty-sixth" of the complaint herein.

Fourth: Admit that on the 25th day of December, 1940, at 6:15 P. M. in the evening of that day, while the plain-[fol. 28] tiff, Howard F. Hoffman, was driving in a Ford Coupe bearing license plate No. 2X361-1940 over, across and upon the defendants' said tracks at a grade crossing hereinbefore set forth, he sustained injuries as alleged in paragraph designated "Eighth" of the complaint herein; and deny each and every other allegation contained in said paragraph designated "Eighth" of the complaint herein, and which said paragraph is repeated, reiterated and realleged in paragraph designated "Thirty-sixth" of the complaint herein.

Fifth: Deny each and every allegation contained in paragraph designated "Fifteenth" of the complaint herein, and which said paragraph is repeated, reiterated and realleged in paragraph designated "Thirty-sixth" of the complaint herein.

Sixth: Deny each and every allegation contained in paragraph designated "Thirty-seventh" of the complaint herein.

Upon information and belief, and for a separate answer and defense, the defendants allege:

First: That whatever injuries the plaintiff, Howard F. Hoffman, and the decedent, Inez Hoffman, also known as Inez T. Spraker Hoffman, may have received at the time and place mentioned in the complaint herein and whatever damages the plaintiff, Hulda Hoffman, may have sustained resulted from the failure of the plaintiff, Howard F. Hoffman, and the failure of the decedent, Inez Hoffman, also known as Inez T. Spraker Hoffman, to

exercise due care and diligence, their own negligence and carelessness contributing thereto.

[fol. 29] Further answering the complaint, and as a second separate answer and defense, the defendants allege:

That at all the times mentioned in the complaint herein there was in force in the State of Massachusetts a certain statute known as Chapter 229, Section 3, of the General Laws of Massachusetts, Tercentenary Edition, 1932, which provides as follows:

"If a corporation operating a railroad, street railway or electric railroad, by reason of its negligence or of the unfitness or negligence of its agents or servants while engaged in business, causes the death of a passenger, or of a person in the exercise of due care who is not a passenger or in the employment of such corporation, it shall be punished by a fine of not less than five hundred nor more than ten thousand dollars, to be recovered by an indictment prosecuted within one year after the time of the injury which caused the death, which shall be paid to the executor or administrator, and distributed as provided in section one; but a corporation which operates a railroad shall not be so liable for the death of a person while walking or being upon its railroad contrary to law or to the reasonable rules and regulations of the corporation, and one which operates an electric railroad shall not be so liable for the death of a person while so walking or being on that part of its railroad not within the limits of a highway. Such corporation shall also be liable in damages in the sum of not less than five hundred nor more than ten thousand dollars, to be assessed with reference to the degree of culpability of the corporation or of its servants or agents, which shall be recovered in an action of tort, begun within one year after the injury [fol. 30] which caused the death, by the executor or administrator of the deceased, and distributed as provided in section one. If an employee of a railroad corporation, being in the exercise of due care, is killed under such circumstances as would have entitled him to maintain an action for damages against such corporation if death had not resulted, the corporation shall be liable in the same manner and to the same extent as it would have been if the deceased had not been an employee. But no executor or adminis-

trator shall, for the same cause, avail himself of more than one of the remedies given by this section."

Upon information and belief, and further answering the complaint, and as a third separate answer and defense, the defendants allege:

First: That at all the times mentioned in the Complaint herein, there was in force in the State of Massachusetts a certain statute known as Chapter 160, Section 232 of the General Laws of Massachusetts, Tercentenary Edition, 1932, which provides as follows:

"If a person is injured in his person or property by collision with the engines or cars of rail-borne motor cars of a railroad corporation at a crossing such as is described in section one hundred and thirty-eight, and it appears that the corporation neglected to give the signals required by said section or to give signals by such means or in such manner as may be prescribed by orders of the department, and that such neglect contributed to the injury, the corporation shall be liable for all damages caused by the collision, or to a fine recoverable by indictment as provided in [fol. 31] section three of chapter two hundred and twenty-nine, or, if the life of a person so injured is lost, to damages recoverable in tort, as provided in said section three, unless it is shown that in addition to a mere want of ordinary care, the person injured or the person who had charge of his person or property was, at the time of the collision, guilty of gross or wilful negligence, or was acting in violation of the law, and that such gross or wilful negligence or unlawful act contributed to the injury."

Second: That at all the times mentioned in the complaint herein, there was in force and still is in force, in the State of Massachusetts a certain statute known as Chapter 90, Section 15 of the General Laws of Massachusetts, Tercentenary Edition, 1932, which provides as follows:

"Every person operating a motor vehicle, upon approaching a railroad crossing at grade, shall reduce the speed of a vehicle to a reasonable and proper rate, and shall proceed cautiously over the crossing. Whoever violates any provision of this section shall be punished by a fine of not less than ten or more than fifty dollars."

Third: That immediately prior to and at the time of the collision referred to in the complaint herein, the operator of the automobile had charge of the person of the decedent, Inez Hoffman, also known as Inez T. Spraker Hoffman, within the meaning of the provisions of Chapter 160, Section 232; that said operator immediately prior to and at the time of said collision was guilty of gross and wilful negligence and was acting in violation of law; that said gross, wilful and unlawful acts on the part of said operator contributed to and were the sole and proximate cause of [fol. 32] said collision and injuries to the plaintiff, Howard F. Hoffman and the decedent, Inez Hoffman, also known as Inez T. Spraker Hoffman; that by reason thereof the plaintiffs are not entitled to recover in this action.

Upon information and belief, and for a fourth separate answer and defense, the defendants allege:

First: That at all the times mentioned in the complaint herein, there was in force, and still is in force, in the State of Massachusetts a certain statute known as Chapter 90, Section 15 of the General Laws of Massachusetts, Tercenary Edition, 1932, which provides as follows:

"Every person operating a motor vehicle, upon approaching a railroad crossing at grade, shall reduce the speed of the vehicle to a reasonable and proper rate, and shall proceed cautiously over the crossing. Whoever violates any provision of this section shall be punished by a fine of not less than ten nor more than fifty dollars."

Second: That immediately prior to and at the time of the collision referred to in the complaint herein, the decedent, Inez Hoffman, also known as Inez T. Spraker Hoffman, voluntarily surrendered to the care and caution of the operator of the automobile all care and caution on her part with respect to the danger of collision from passing trains at the crossing in question, and wholly relied upon said operator to protect her from said injury; that said operator was guilty of negligence and was acting in violation of law in failing to reduce the speed of said vehicle to a reasonable and proper rate and in failing to proceed cautiously over said crossing; that said negligent and unlawful acts [fol. 33] on the part of the operator of said automobile contributed to and were the proximate cause of said col-

lision; that by reason of the violation of the above Chapter 90, Section 15, the plaintiffs are not entitled to recover in this action under the common law of Massachusetts.

Upon information and belief, and for a fifth separate answer and defense, the defendants allege:

First: That at all the times mentioned in the complaint herein, there was in force in the State of Massachusetts a certain statute known as Chapter 160, Section 232, of the General Laws of Massachusetts, Tercentenary Edition, 1932, more particularly set out in paragraph designated "First" of defendants' third separate answer and defense.

Second: That at all the times mentioned in the complaint herein, there was in force in the State of Massachusetts a certain statute known as Chapter 90, Section 7, of the General Laws of Massachusetts, Tercentenary Edition, 1932, the first two sentences of which are as follows:

"Every motor vehicle operated in or upon any way shall be provided with brakes adequate to control the movement of such vehicle and conforming to rules and regulations made by the registrar, and such brakes shall at all times be maintained in good working order. Every automobile shall be provided with at least two braking systems, each with a separate means of application, each operating directly or indirectly on at least two wheels and each of which shall suffice alone to stop said automobile within a proper distance as defined in said rules and regulations; provided, [fol. 34] that if said systems are connected, combined or have any part in common, such systems shall be so constructed that a breaking of any one element thereof will not leave the automobile without brakes acting directly or indirectly on at least two wheels. * * *

Third: That the brakes of the motor vehicle in which the plaintiff, Howard F. Hoffman, and the decedent, Inez Hoffman, also known as Inez T. Spraker Hoffman, were riding were not adequate to control the movement of said vehicle, did not conform to the rules and regulations made by the Registrar, were not maintained in good working order, and were not sufficient to stop said automobile within a proper distance.

Fourth: That immediately prior to and at the time of the collision referred to in the complaint herein, the oper-

ator of said automobile, who had charge of the person of the decedent, Inez Hoffman, also known as Inez T. Spraker Hoffman, within the meaning of the provisions of Chapter 160, Section 232; that said operator immediately prior to and at the time of said collision operated said motor vehicle in violation of said Chapter 90, Section 7; that said violations on the part of the said operator contributed to and were the sole and proximate cause of said collision and injuries to the plaintiff, Howard F. Hoffman, and the decedent, Inez Hoffman, also known as Inez T. Spraker Hoffman; that by reason thereof the plaintiffs are not entitled to recover in this action.

Upon information and belief, and for a sixth separate answer and defense, the defendants allege:

First: That at all the times mentioned in the complaint herein, there was in force in the State of Massachusetts, a [fol. 35] certain statute known as Chapter 90, Section 7, of the General Laws of Massachusetts, Tercentenary Edition, 1932, more particularly set out in paragraph "Second" of defendants' fifth separate answer and defense.

Second: That immediately prior to and at the time of the collision referred to in the complaint herein; the decedent, Inez Hoffman, also known as Inez T. Spraker Hoffman, voluntarily surrendered to the care and caution of the operator of the automobile all care and caution on her part with respect to the danger of collision in passing trains at the crossing in question and wholly relied upon said operator to protect her from said danger; that said operator acted in violation of law, in that the motor vehicle which he operated was not provided with brakes adequate to control the movement of such vehicle, said brakes did not conform to the rules and regulations made by the Registrar, said brakes were not at all times maintained in good working order, said brakes were not sufficient to stop said automobile within a proper distance; that said negligence and unlawful acts on the part of the operator of said automobile contributed to and were the proximate cause of said collision; that by reason thereof the plaintiffs are not entitled to recover in this action under the common law of Massachusetts.

Wherefore, the defendants demand judgment dismissing the complaint herein, with costs.

Edward R. Brumley, Attorney for Defendants, Office and Post Office Address, Room 3841, Grand Central Terminal, Borough of Manhattan, City of New York.

[fol. 36] IN UNITED STATES DISTRICT COURT

PLAINTIFFS' BILL OF PARTICULARS—August 8, 1941

The plaintiffs for a Bill of Particulars respectfully allege:

1. The plaintiff, Howard F. Hoffman, was rendered unconscious and was first able to speak rationally and coherently approximately five weeks after said accident. Plaintiff sustained a compound comminuted fracture of the right leg which was distorted between the knee and femur with a piece of bone protruding through the flesh and his clothing; compound fracture of the left femur; laceration of the head anterior to the left ear about 5 inches long; laceration of the upper eyelid about two inches long; laceration under the left side of chin about one inch long; all of which lacerations required sutures and which produced scars which will be permanent; a puncture of about 2 inches in diameter about the right femur; concussion of the brain with subdural hemorrhage and traumatic shock; that a steel plate was inserted in the femur of his left leg which will remain there permanently and osteomyelitis acute, right femur and traumatic shock. That plaintiff has been unable and will be unable to walk and to use his limbs with the usual freedom of motion for a long period of time. That plaintiff has suffered great pain and will continue to suffer pain and since the accident has suffered from nervous and dizzy spells and has been unable to sleep.

2. The following injuries are permanent:

(a) Limitation of motion in the knee joints of both legs.

(b) Scars on face, head, eye and legs.

[fol. 37] (c) Torn muscles of both legs which will require operative procedure to reconstruct the same.

3. (a) Plaintiff has incurred expenses for doctor bills and medicine bills the extent of which are at present un-

known to plaintiff and will, in the future, incur additional doctor bills and medicine bills the extent of which is unknown. Plaintiff reserves the right to furnish said amounts to defendants in a further Bill of Particulars at a future date.

(b) That plaintiff has incurred and paid for hospital bills in the sum of \$2688.50.

4. That plaintiff was confined to the hospital from the 25th day of December, 1940 to the 27th day of May, 1941 and has been confined to his bed and home up to the present date. Plaintiff reserves the right to amend this Bill of Particulars to include further confinement.

5. The plaintiff is a Civil Engineer and his average earnings at the time of the accident were \$115.40 per month, in addition to annual bonus, and he has been prevented from attending to his business since the date of the accident, and plaintiff reserves the right to further amend this Bill of Particulars as to future loss of earnings, and plaintiff further claims that as a result of the accident he has been prevented from accepting a position as a Junior Camp Sanitarian for the State of New York as a result of having duly qualified by a State Civil Service Examination through a competitive examination, said loss of position entailing all the emoluments thereof including retirement and pension rights.

6. The decedent, Inez Hoffman, also known as Inez T. Spraker Hoffman, was born May 12th, 1918 and at the time of her death was twenty-three years of age.

[fol. 38] 7. The Funeral Bill of Inez Hoffman amounts to the sum of \$516.00.

8. The plaintiff, Hulda Hoffman, purchased a new 1940 Ford Coupe on the 18th day of May, 1940 for the sum of \$781.00.

Dated: August 8th, 1941.

Yours, etc., Benjamin Diamond, Attorney for Plaintiffs, Office & P. O. Address, 1542 Flatbush Avenue, Brooklyn, New York:

To: Edward R. Brumley, Esq., Attorney for Defendants, Office & P. O. Address, Room 3841, Grand Central Terminal, New York City.

[fol. 39] IN UNITED STATES DISTRICT COURT

STIPULATION DISCONTINUING ACTION BY PLAINTIFF HULDA
HOFFMAN—September 15, 1941

It is hereby stipulated by and between the attorneys for the respective parties hereto that the action brought by Hulda Hoffman, as one of the plaintiffs in the above entitled action against the defendants be and hereby is discontinued without costs to either party as against the other.

Dated: September 15th, 1941.

Benjamin Diamond, Attorney for Plaintiff. Edward
R. Brumley, Attorney for Defendants.

[fol. 40] IN UNITED STATES DISTRICT COURT

STIPULATION AMENDING PARAGRAPHS FIRST AND SECOND OF
COMPLAINT—September 15, 1941

It is hereby stipulated by and between the attorneys for the respective parties hereto that paragraphs marked "First" and "Second" of the plaintiffs' complaint be amended in the following manner to read as follows:

First: That the plaintiff, Howard F. Hoffman, is a citizen of the United States, a citizen of the State of New York, and a resident of the Borough of Brooklyn, County of Kings, City and State of New York which is within the jurisdiction of the United States District Court, Eastern District of New York.

Second: That upon information and belief, the defendant is a railroad corporation duly organized and existing under and by virtue of the laws of the State of Connecticut and maintains its principal office in the City of New Haven, State of Connecticut and a branch office in the City of New York, State of New York, and operates passenger and freight trains through the State of Connecticut and the State of Massachusetts and is doing business within the Eastern District of New York, State of New York.

It is further agreed that the denials and admissions as contained in the defendants' answer to the aforementioned

paragraphs are set forth in plaintiffs' complaint shall be deemed applicable to the paragraphs as amended herein.

Dated: September 15th, 1941.

Benjamin Diamond, Attorney for Plaintiffs. Edward
R. Brumley, Attorney for Defendants.

[fol. 41] IN UNITED STATES DISTRICT COURT

Statement of Evidence

Brooklyn, N. Y., Monday,
November 10, 1941 (10:30 A. M.).

Before Hon. Matthew T. ABRUZZO, U. S. D. J., and a Jury

Appearances:

Benjamin Diamond, Esq., Attorneys for Plaintiffs; William Paul Allen, Esq., of Counsel.

Edward R. Brumley, Esq., Attorney for Defendants.

(A jury was duly empaneled, examined, accepted, and sworn.)

(Mr. Allen made an opening statement to the jury on behalf of the plaintiffs.)

(Mr. Brumley made an opening statement to the jury on behalf of the defendants.)

Mr. Allen: I first offer in evidence letters of administration, Mr. Brumley, appointing Howard F. Hoffman administrator of the estate of his wife, Inez Hoffman.

Mr. Brumley: There is no objection.

(Marked Plaintiffs' Exhibit 1 in evidence.)

Mr. Allen: If your Honor would care to have a slight memorandum I have here—?

The Court: Have you got a memorandum, Mr. Brumley?

Mr. Brumley: I haven't it typed. I do have a memorandum.

[fol. 42] The Court: Later then?

Mr. Brumley: Oh, yes, your Honor.

The Court: All right.

HOWARD FREDERICK HOFFMAN, one of the plaintiffs, called as a witness in behalf of the plaintiffs, being duly sworn, testified as follows:

Direct examination.

By Mr. Allen:

Q. Mr. Hoffman, I am going to ask you to speak fairly loudly so that everybody here in the jury box can hear your answers?

A. Yes, sir.

Q. Where do you live, Mr. Hoffman?

A. Well, temporarily I am living in Troy. Of course, my home is Brooklyn; Flatbush.

Q. In Troy where is your residence?

A. It is 36 First Street.

Q. That is a temporary residence there, while you are doing post graduate work at Rensselaer Polytechnical Institute?

A. Yes, sir.

Q. And your permanent home is where?

A. Brooklyn, New York.

Q. Where?

A. 403 East 19th Street.

Q. How old are you, Mr. Hoffman?

A. Well, 24—twenty-four and a half, approximately.

Q. When is your birthday?

A. February 21st.

Q. You were 24 at that time?

A. Yes.

Q. Tell us where you went to school.

A. When I graduated college, or where?

Q. You went first where?

A. I went first to a Flatbush school, in Brooklyn.

Q. A Flatbush public school?

A. No, private school.

Q. Then?

A. Then I went to Polytechnical Preparatory Day Coun-[fol. 43] try School in Brooklyn, and then up to Rensselaer Polytechnical Institute in Troy.

Q. Were you graduated from Rensselaer Polytechnical Institute?

A. Yes, sir.

Q. When?

A. In June, 1940.

Q. With what degree?

A. Bachelor of Civil Engineering.

Q. Will you tell us briefly just what does that prepare you for, that degree of civil engineering; what type of work?

A. Well, with the course they give at Rensselaer, why, it prepares you to do anything; but naturally it extends a little more in building construction, bridge construction, tunnel work, highways, railroads; surveying, of course.

Q. That was the work which you had elected to pursue?

A. Yes.

Q. After your graduation from Rensselaer when did you go to work, if at all?

A. Why, I went to work for New York State Department of Health, from the office at Kingston, New York.

Q. Was that a temporary job?

A. That was a temporary job; yes.

Q. When did you start that?

A. Why, I started that the beginning of May.

Q. Was it before you had actually received your degree from college?

A. Yes, it was.

Q. And you received in that work what—how much?

A. I received \$150 a month, plus expenses.

Q. And how long did you work there?

A. I worked there until the beginning of September.

Q. Between the time you graduated from college in June and the beginning of September, 1940, were you married?

A. Yes.

Q. When were you married?

A. August 10th.

Q. And to whom were you married?

A. Miss Inez Spraker.

[fol. 44] Q. And where did she live?

A. Cooperstown, New York.

Q. Did your family also have a home at Cooperstown, New York?

A. Yes; we have a summer residence there.

Q. And did Miss Spraker, who later become Mrs. Hoffman, reside there for some time?

A. Since her birth.

Q. Was her father in business there?

A. Yes.

Q. What was his business?

A. Why, he was in the printing business.

Q. When did you say you were married?

A. August 10, 1940.

Q. And how old was your wife at that time, do you recall?

A. Oh, say 22.

Q. She was a little younger than you?

A. A little younger than I by approximately one year.

Q. Had she graduated from college?

A. Yes.

Q. What college?

A. Vassar, on the Hudson.

Q. In June, 1940?

A. In June, 1940.

Q. Had she ever done any work?

A. Yes, she had.

Q. What?

A. She had worked in her father's office, printing office.

Q. Where did you go to work in early September of 1940?

A. I went to work for the Turner Construction Company in Hartford, Connecticut. They were putting up buildings for Pratt & Whitney Aircraft.

Q. In what capacity did you go to work there; as what?

A. Well, to become accustomed to the trade, shall we say, as an engineer, everything in connection with the job, doing considerable surveying and supervision of concrete pours and so on. We say "concrete pours."

Q. Had that work which you had with the Department of Health anything to do with sanitary engineering work?

A. Why, yes; that was strictly sanitary engineering work, which I was quite interested in, and it involved shall we say, inspection of boarding houses, hotels, camps, and [fol. 45] so on, to see that the water supply was good, the sewage disposal was proper, and that the food was good.

Q. Is that the type of work for which you prepared yourself in getting this degree in civil engineering?

A. Yes.

Q. Did that come along that line?

A. That is the line it finally took. My last few years of work at school when I became familiar with that branch of civil engineering which embraces so much.

Q. I see. And when you went to work for the Turner Construction Company, what were your wages?

A. I was getting \$28.50 a week.

Q. Was this a temporary job also, this Turner Construction Company work?

A. Well, no. That was a permanent job, and, of course, excellent possibilities of building up.

Q. At the time you worked for the Department of Health had you taken any service—civil service examination or had you taken any while you were working?

A. I took it while I was working for the Department of Health.

Q. And subsequently passed it, did you?

A. And subsequently passed it, and—well, rated fairly on the list, and was forced to turn down the job this summer because I was—well, I couldn't get around.

Q. Did this type of work for which you prepared yourself and the work which you had been in require activity and agility in getting around?

A. Well, in my opinion, it does. There are so many—this is a blame on the engineer, shall we say—there are so many people who sit down and design something—design a bridge or tunnel or something else, and don't see the site, and don't see the factors, which I can't express to you or you can't express to me if we are both in the same business.

Q. That requires your getting around?

[fol. 46] A. You have to. You can't do a job, in my opinion, unless you see the site.

Q. When you went to Hartford to this job, did you and your wife take an apartment there?

A. Yes.

Q. Did she take care of the home?

A. Yes.

Q. And prepare meals?

A. Yes.

Q. And do other housework that a wife would do?

A. Yes. Yes.

Q. Along in December, of 1940, did you leave Hartford on any visit?

A. Well, I had from the Monday before Christmas until the Thursday after Christmas off, so I left home on Saturday and came to Brooklyn to see my parents, and then the following Monday we went up to Cooperstown to see her parents.

Q. And your accident occurred on what day of the week?

A. Wednesday.

Q. You arrived at Cooperstown the Monday preceding Christmas?

A. Yes.

Q. And you stayed there until Christmas day; is that correct?

A. Yes; that is right.

Q. On Christmas Day about what time did you leave Cooperstown?

A. About—well—a quarter after three.

Q. And who was with you?

A. My wife.

Q. No one else?

A. No one else.

Q. What kind of car did you have?

A. Well, I had a 1940 Ford coupe.

Q. That was owned by your mother?

A. That was owned by my mother, yes.

Q. Had you driven it before?

A. Yes, I had.

Q. When you left Cooperstown on Christmas afternoon where were you bound for?

A. Hartford, Connecticut; back to our home there.

Q. Do you remember what kind of day it was?

A. Well, it was a cold—it was warm for the time of the year, shall we say. It was not as cold as one would usually expect to meet.

[fol. 47] Q. Was it clear?

A. Yes.

Q. Leaving Cooperstown, how did you proceed; do you recall?

A. Well, yes. We traveled either on Route 20 to Albany, and then traveled south a few miles and back onto Route 20 over towards Pittsfield.

Q. You traveled south a few miles, I suppose, on Route 9?

A. Yes.

Q. And then struck onto 20?

A. Yes; and then back on 20. Really, I was on 20 all the time, shall we say, and it has a section known as Route 9.

Q. Then after you passed Albany you got back onto Route 20?

A. Yes.

Q. When you were on Route 20 did you leave Route 20 to go on any other route?

A. Not until I was up a few miles outside of Pittsfield, a few miles west of Pittsfield.

Q. Do you know what the number of that route was as you turned into it from Route 20?

A. Of course I have learned, and I have heard since. It is either 41 or 43.

Q. But at that time you did not know what route it was?

A. No, I didn't.

Q. Were you going by road map or by the signs?

A. I was going by a road map, yes; and signs given to me by a fellow that I know who lives in Connecticut who told me where I could find this turn to take.

Q. Had you ever come down this route before?

A. Not after making that turn, no, I hadn't.

Q. You had come from Cooperstown to Albany before?

A. Yes.

Q. And then had you gone from Albany to Hartford before?

A. Yes, I had.

Q. But you hadn't used this route that you used this time?

A. No.

Q. Do you recall about what place it was that you turned off on this Route 41 or 43, or don't you know?

[fol. 48] A. Well, of course, I have learned since that it was in the Lebanons.

Q. In the Lebanons?

A. Yes.

Q. After you got onto this Route 41, which I think Mr. Brumley will concede is correct, as to the route number, isn't it—

Mr. Brumley: We will call it 41, anyway. I think that is it.

Mr. Allen: Yes.

Q. After you got onto Route 41 about how fast were you proceeding, would you say?

A. Well, 35—40 miles an hour. Not knowing the road, and so on, naturally, I was going a little slow.

Q. As you came along on this Route 41 did you observe any railroad tracks at any place? I mean before this time when you had your accident, any other place?

A. Why, yes. We—as a matter of fact, we crossed over a three-track line on an elevated crossing. That is, we were above. We were over the rails, and they were below us.

Q. You don't know what road that was?

A. I don't know.

Q. That was some little distance from where you met with your accident?

A. Yes, it was two miles.

Q. After you had passed this overhead or after you went above this three-track road were you still proceeding along about 35 or 40 miles an hour?

A. Yes.

Q. Was there anything which you noticed which advised you that there was a railroad crossing ahead of you?

A. Well, there was a reflector sign on the right-hand side of the road which reflected in my headlights.

Q. Did you have your headlights burning at that time?

A. Yes.

Q. Were they on full, or how?

A. They were on full.

[fol. 49] Q. Was it dark at that time?

A. Well, it was. Yes, it was dark; it was pitch black, you might say.

Q. About what time was it?

The Court: What time was it?

A. It was about—well, it was between 6 and 7.

Q. Where did you see this sign? Where was it—on which side of the road?

A. It was on the right-hand side of the road.

Q. And did you observe whether or not there was any white marker in the center of the roadway?

A. I am afraid I can't remember and can't say, although I have seen pictures, and it seems to me there is one there.

Q. On which side of the roadway were you driving—the right side or the left?

A. Well, the right-hand side.

Q. When you observed this sign indicating a railroad on the right side of the road what did you do, if anything, with regard to your speed?

A. Why, naturally I slowed down and bore in mind to some extent the three-track line which I had passed over before and considered this might be it. I slowed down until my lights indicated a track, and I stopped at that time.

Q. When you say you slowed down can you tell about what speed you made, at least before you stopped? I mean when you slowed from the 35 to 40 miles an hour, can you say about how fast you were going after that or just before you came to a stop?

A. Well, I am afraid I can't. I mean it is practically—before you come to a stop you are not moving.

Q. You say you did come to a stop?

A. Yes.

Q. When did you come to a stop; what caused you to stop?

A. Why, when I observed the tracks in my headlights.

Q. And about how far away from the tracks did you come to your stop?

A. 15, 20 feet.

[fol. 50] Q. Before you came to that stop could you see the tracks ahead of you any distance, or did you come to a stop as soon as you had seen the tracks?

A. Well, I could see them in the headlights, yes, for a short time before I came to a stop.

Q. When you came to a stop about 15 or 20 feet away from the tracks, could you see whether there was one set of tracks or more than one ahead?

A. Why, I wouldn't say whether I could or not.

Q. When you came to a stop how was your engine; in what position?

A. It was idling.

Q. In neutral, you mean?

A. Yes; oh, yes. The gear was in neutral.

Q. As you were driving along there, can you say whether or not any one of your windows of your car was open?

A. The window on my side was open.

Q. You were seated, of course, on the left?

A. Yes.

Q. Your wife was seated in the front seat alongside you?

A. Yes.

Q. Which window on your side was open; the little window in front or the bigger one?

A. The bigger one, the large window.

Q. The large one?

A. Yes.

Q. When you came to a stop about 15 or 20 feet from these tracks what did you do, if anything?

A. Well, I naturally came to a stop to see if there were any trains coming.

Q. Yes.

A. And I looked in both directions and could see nothing, and I heard nothing, so I proceeded ahead.

Q. Are you sure you looked in both directions, Mr. Hoffman?

A. That is why I stopped.

Q. Did you look?

A. Yes, I am sure.

Q. And did you see anything?

A. Nothing.

Q. Did you hear anything?

A. No.

Q. Did you hear any bell of any engine?

A. No.

[fol. 51] Q. Or any whistle of a train?

A. No. If I had heard anything or seen anything, I never would have started.

Mr. Brumley: I move to strike that out.

The Court: Strike it out.

Q. You didn't hear or see anything; is that right?

A. That is right.

Q. When you started up in what speed did you start?

A. First speed.

Q. First speed?

A. Yes.

Q. And from the time you started up in first speed what did you do as to observing conditions?

A. Well, as any driver does, naturally, my main attention was focused on the road ahead of me, unquestionably. Why, I could look around, really, and see.

Q. Did you look around on both sides?

A. Not that I remember, I will say; but I as a driver, why, I observed.

Q. You observed?

A. Yes.

Q. You mean you have no recollection of deliberately turning your head to one side or the other; is that what you mean?

A. That is right.

Q. But were you alert as you looked, as you started up?

A. Yes.

Q. To the surrounding circumstances and conditions?

A. Yes; absolutely.

Q. About how fast would you say you were moving at the time you started up in first speed until the accident?

A. 3, 5 miles an hour, I would say.

Q. Had you shifted at all from first speed up until the time of the accident?

A. No.

Q. Moving at 3 to 5 miles an hour that night in about what distance can you stop your car?

A. Well, the time it takes you to say "Stop," and the distance is, say 2 feet.

Q. Was your car in good condition that night?

A. Yes.

Q. Were the brakes operating properly?

A. Yes.

[fol. 52] Q. And moving ahead, then, at 3 to 5 miles an hour, as you have described, what is the next thing that you noticed?

A. Well, I noticed this—I have since learned it was not an engine—I noticed this train, then, to my left, and then I woke up in Pittsfield.

Q. Starting out as you have described, moving at 3 to 5 miles an hour, where were you, physically, yourself, as regards the tracks, if you know, when you saw something?

A. That, of course, is another presumption, but I will say I was about over the near rail, the one I approached.

Q. The first rail?

A. Yes.

Q. The first rail, about over that?

A. About over that rail.

Q. And the forward part of the car, the radiator, was farther over or toward or over to the other rail?

A. Yes.

Mr. Brumley: I don't want to interrupt, but I think the plaintiff ought to tell us.

The Court: Yes; sustained. I think, Mr. Allen, you should not lead him. Let him tell it in his own way.

Q. At the time that you were in a position that you described, about over the nearest rail, what then did you notice, if anything?

A. Well, things happened so fast that from then on I didn't notice it.

The Court: Now, Mr. Witness, here you have got to answer directly. I have allowed you to tell your story in your own way, but at this point I must direct you to answer the questions asked of you. What did you see, if anything, to your left? If you didn't see anything, just say so. If you did, say so.

The Witness: I saw this object to my left.

[fol. 53] Q. Can you describe what the general nature of that object or size of that object was?

A. No.

The Court: What did it look like to you, is what counsel means?

The Witness: No, I am afraid I can't. Remember it was dark.

The Court: No, no. Right here, Mr. Witness, I think you had better adopt my suggestion. It would be better for you and for the whole case. You had better answer these questions directly. Later on we will let you go on and do as you want, but right here you must answer them directly.

The Witness: Yes, sir.

The Court: Don't please, give us anything voluntarily.

Q. When you looked up you saw——

Mr. Brumley: Let me have that question. I think there is a question.

Mr. Allen: Yes. May we have the last question?

The Court: Yes.

(Question read by reporter.)

A. No.

Q. Did you see any light when you looked that way?

A. No.

Q. As you looked up what was the picture you got there?
Can you tell us what it was?

A. No, I can't.

The Court: What he wants is very simple, Mr. Witness.
He wants you to describe as best you know what you saw.

Mr. Allen: Yes.

The Witness: Shall we say a mass?

[fol. 54] The Court: No—you say it.

The Witness: Well, I will say a mass.

The Court: What kind of mass? What did it look like to you?

The Witness: Well, it was a large mass, weighing up, shall we say—extending over my head, at the time.

The Court: How near to you was it?

The Witness: I can't tell that.

The Court: Give us your best judgment. Was it far away or close to you or what?

The Witness: It was where I was.

The Court: Right close to you?

The Witness: Yes. Yes, it was close.

The Court: From the time you saw it until you were struck—you realize you were struck; is that right? You were hit with something; is that right?

The Witness: That is right.

The Court: You didn't become unconscious, of course, until you were hit; is that right?

The Witness: That is right.

By the Court:

Q. You were struck by something; is that right?

A. That is right.

Q. You know it was this dark object that struck you; is that right?

A. That is right.

Q. From the time when you saw it until you were hit did any perceptible time elapse?

A. No.

Q. Would you say it was any fraction of a second, or a second?

A. I wouldn't want to mention it.

Q. It was so small you couldn't mention it; is that right?

A. Yes.

The Court: All right. Proceed.

[fol. 55] By Mr. Allen:

Q. As you previously said, then the next thing you knew you were in the hospital at Pittsfield?

A. Yes.

Q. As you looked up and saw this—I think you used the expression—dark mass, higher than your head, did you see any light at all to your left?

A. No.

Q. As you moved down to this crossing from your stopped position were there any cars coming toward you?

A. No.

Q. Were your lights throwing ahead, then, as they had been as you came up to the track?

A. Yes. Yes.

Q. Did you observe any car alongside you?

A. No.

Q. Or back of you?

A. No. No car in back.

Q. About how long after December 25th was it that you came to, recovered consciousness at the hospital, if you know?

The Court: That would be for his physician to say. He was told. Have you records?

Mr. Allen: Yes, we have the records. We have the hospital records.

The Court: What does this record show as to his recovering consciousness?

Mr. Brumley: I will concede that he recovered consciousness.

The Court: We can get that later.

By the Court:

Q. You didn't wake up in the hospital until some time later—a week or a month; but it was some time later?

A. Yes.

Q. You were told at that time when it was?

A. That is right.

[fol. 56] Q. You had no perception when it was until you were told; is that right?

A. That is right.

By Mr. Allen:

Q. When you did come to your senses in the hospital were you in the bed?

A. Yes.

Q. And what was your condition as far as any casts or anything else that was on you?

A. Well, I was in a cast from just below my chest right down over my toes—both legs were in a cast.

The Court: I think you had better start to keep your voice up. You are starting to drop your voice. I notice that the last gentleman in the second row didn't hear you.

The Witness: Yes, sir.

Q. Both legs were in a cast from the toes up to your chest?

A. Well, up to the lower part of my chest, say about here (indicating); from here down (indicating).

Q. Do you know what was done for you at any time in the hospital? Were you taken to the operating room after that, do you know?

A. Well, yes; I remember—well, at the beginning of March they removed the cast from the left leg and put a new one on my right leg, and then, shall we say, at the beginning of April they removed the cast from the right leg too, and then they operated—well, they manipulated my legs a bit to get a little bend back into the knees.

Q. They gave you some local anaesthetic?

A. Yes; two or three times.

Q. And then manipulated your legs?

A. Yes.

Q. Was that painful at all?

A. Well, with the local anaesthetic it was not; but I knew they had been doing some work on my knee when I woke up later on.

[fol. 57] Q. Yes; and how long did you stay in the hospital, Mr. Hoffman?

A. I stayed there until the end of May.

Q. And after they took the cast off how did you get around in the hospital; what was the method you used?

A. Well, the first way I got around was in a walker, which consists, it seems to me, of a fence on wheels, and some grips, so that you can get hold of it with your hands and bear your weight on your arms rather than on your feet, and learn to walk.

Q. And then did they give you crutches, too?

A. Then they gave me crutches, and a cane, finally.

Q. What day was it that you left the hospital, do you recall?

A. The end of May; say the 27th of May.

Q. And where did you go?

A. I went to Brooklyn.

Q. And stayed in Brooklyn for how long?

A. Stayed in Brooklyn until the end of June.

Q. And then where did you go?

A. Then I went to Cooperstown.

Q. And remained there during the summer of 1941?

A. Yes.

Q. And then in September where did you go?

A. Well, in September I went to Troy to go back to school. Now, I went to Pittsfield, first, to see the doctor.

Q. What doctor was that?

A. Dr. Copeland.

Q. Was he the doctor who had charge of you in the Pittsfield Hospital?

A. Yes.

Q. And you saw him then, did you?

A. Yes.

Q. And then after that where did you go?

A. I went to Troy.

Q. Back to Rensselaer, was it?

A. Back to Rensselaer.

Q. What kind of work do you take there now?

A. Well, I am studying for a master's degree in civil engineering, and I am studying engineering economics and

advanced geology and soil mechanics and sanitary engineering.

[fol. 58] Q. Why did you go to Rensselaer?

A. Well, because it impressed me that a man or a boy in a business such as I am in, he has to be able to get around, and I can at least hope that by next spring I will be able to do that better than I can now.

Q. Does that work give you a relaxation from your mind, that study?

A. Well, yes; it gives me something to think about.

Q. How do you find it getting around? Do you have any difficulty?

A. Well, at times I have difficulty, yes. It takes me twice as long to do what I want to do.

Q. Do you walk with a limp?

A. Yes.

Q. I notice that you have your right leg over, with the toe pointed in. How does that happen to be that way? Is that the natural way? Do you get more comfort that way, or what?

A. I get more comfort; that is the whole thing.

Q. How do you find it going up and down stairs?

A. Well, it requires time; and through that time I have had I have been able to learn how to get up and down a little bit better.

Q. Do you always use a cane going around?

A. Yes.

Mr. Allen: You may examine.

The Court: Gentlemen, will you just bear with me for a minute? I should like to take an adjournment now until a quarter after one, and I should like to leave here at half-past two. Do you think you could conclude your cross-examination in an hour and a quarter?

Mr. Brumley: Yes.

The Court: How about having a morning session tomorrow morning? After all, I have this other case. The building will be closed, but I will see that you get up here. I will ask the jury afterward.

[fol. 59] (Discussion at the bench between the Court and counsel.)

The Court: All right, there will be no morning session. Mr. Allen has a boy in the Army on the way home, and I

have a boy in camp, and I wouldn't want to stop him from seeing his boy. Maybe you are right.

Be back in your seats, members of the jury, at a quarter after one. Don't come back, please, at 20 after one, because I am going to be right here. Don't have any of the jurors say that they don't understand. It is a quarter past 12 now. I should like to have you back in your seats by a quarter after one, and you can telephone your office and tell them that you will be back in your office today to do some work by 3 o'clock, if you want to. Return at a quarter past one.

(Recess until 1:15 P. M.)

Afternoon Session
(1:15 P. M.)

HOWARD F. HOFFMAN resumed the stand and testified further as follows:

Cross examination.

By Mr. Brumley:

Q. Mr. Hoffman, you say you were educated in Brooklyn schools at first?

A. Yes, sir.

Q. What school?

A. Well, I started in Flatbush School and finished in Polytechnical Preparatory Country-Day School.

Q. You didn't go to any of the public schools?

A. No.

[fol. 60] Q. And from the Polytechnic School you went to Polytechnic Institute, at Troy, Rensselaer?

A. Rensselaer, yes.

Q. And you took a four-year course there?

A. Yes.

Q. And now you are taking a post graduate course; is that it?

A. Yes.

Q. To get a master's degree?

A. Yes.

Q. What will be the name of that degree?

A. Well, Master of Civil Engineering.

Q. How long does that take, ordinarily?

A. One year.

Q. So if everything goes well you expect this coming June to have your master's degree; is that right?

A. Yes, sir.

Q. And that master's degree fits you for what; for what?

A. Anything.

Q. Anything in civil engineering?

A. Yes.

Q. It does not confine one to sanitary engineering properly?

A. No, no, it does not.

Q. In other words, the work that you are taking this year is broader than the work you took as an undergraduate?

A. No, it is not as broad.

Q. It is in what particular field?

A. It is in a more particular field. I mean at this time I can specialize, really, if I want to.

Q. What is the specializing that you do?

A. Well, under present conditions I am working, really, with soil mechanics,—foundations.

Q. I think in answer to one of Mr. Allen's questions you said that you hoped by next spring to get around better on your legs?

A. Yes.

Q. With that idea in mind in part you are pursuing this post graduate course?

A. Yes.

Q. Much of the work of the civil engineer, of course, is done inside the office, is it not?

A. Many of the failures you hear of are done inside of the office, yes.

[fol. 61] Q. And some of the successful work is done inside the office, of course?

A. It requires both inside and outside work. You have to visit the site and really know the conditions better than you can by just sitting in the office at a table.

Q. And you are continuing your studies in civil engineering in the hope and reasonable expectation that by next spring you will be able to conduct—follow your profession, both inside and outside?

A. Well, of course, there is the way out there, possibly, in leaving civil engineering as a profession and in teaching in civil engineering.

Q. You would be qualified with a master's degree to get into teaching, wouldn't you?

A. Well, yes; with a bachelor's degree I would be qualified to some extent, and I ~~ought~~ to be more qualified with a master's degree; also with the possibility of doing laboratory work.

Q. In the same field?

A. In those fields; yes.

Q. Getting down to the time of the accident, are you sure that the larger part of the window on your side, the front window, was down?

A. Yes.

Q. Was it all the way down?

A. That I wouldn't venture to guess at.

Q. Would you venture to guess—I withdraw that. You are not willing to say whether it was all the way down or not?

A. No.

Q. Are you willing to say that it was half the way down?

A. Yes.

Q. Or is that just a guess?

A. Well, it is eleven months back, so we will say it is just a guess.

Q. Are you willing to say positively that it was more than a quarter of the way down?

A. It was down, yes.

Q. Are you able to tell us about how far down, without guessing?

A. No.

Q. So you are not able to tell us whether it was more than a quarter of the way down?

A. No.

[fol. 62] Q. You said you came to a stop, as I get it, when you observed the track; is that right?

A. That is right.

Q. That is approaching this grade crossing you saw at one time, at one point, the railroad track; is that right?

A. Yes, at the time I stopped.

Q. And you stopped because of that track?

A. Yes.

Q. On that journey between Cooperstown and the scene of the accident did you always come to a stop when you saw a railroad track?

A. When I knew the road, I will say no; but when I don't know the road and don't know the vicinity I am in, yes.

Q. That was your habit, was it?

A. Yes.

Q. When you came to a stop there were no other cars in front of you or behind you?

A. No.

Q. You saw no other cars on the highway that night up to the time of the accident, did you?

A. Not that particular section; not that I know of.

Q. I mean in that particular section.

A. Not that I know of.

Q. You came to a stop 15 to 20 feet from the railroad track?

A. Yes.

Q. And how long were you in a stopped position?

A. Five seconds.

Q. What is that?

A. Say five seconds.

Q. And after five seconds you started up?

A. After that time, yes; after a time, yes.

Q. I beg your pardon?

A. After a time.

Q. I mean how long were you in a stopped position?

A. Well, I don't keep a record of those things, and I am estimating merely from looking at the clock and saying five seconds; it might have been more.

Q. Is that your best estimate today, five seconds, that you stopped 15 to 20 feet from the track?

A. Yes.

Q. Do you remember my examining you before trial? Do you?

A. Yes.

[fol. 63] Q. Do you remember this question and answer, at page 13:

"Q. How long do you think you were in a stopped position?

A. That is a difficult thing to figure but, oh, say 30 to 40 seconds."

Do you remember making that answer?

A. Yes.

Q. That was about two weeks ago, wasn't it?

A. A short time ago; yes.

Q. Is that answer wrong?

A. That answer was as close as I could estimate it at the time; but now at the present time I have a clock here and I can have a better conception of time.

Q. Has anything occurred between the time of that examination and today, other than the clock, to make your estimate vary from 20 to 30 seconds, down to 5 seconds?

A. Yes. I have thought about that considerably and actually checked with clocks to get a better conception of time.

Q. When you came to a stopped position you put the gears into neutral, didn't you?

A. Yes.

Q. At one time prior to the accident you looked toward the left, didn't you?

A. Yes.

Q. When was that?

A. Well, I pulled up to the crossing and stopped, and naturally looked both ways and pulled ahead.

Q. Just as soon as you came to a stop did you look both to the left and the right?

A. Yes.

Q. And then you remained in that position about 5 seconds; is that right?

A. Approximately that time; yes.

Q. And then you shifted gears into first?

A. Yes.

Q. And went ahead; is that right?

A. That is right.

Q. What is the estimate of the distance you covered from the stopped position until the place of the collision, to the place of the collision?

A. 20-25 feet.

Q. How long did it take you altogether from the time [fol. 64] that you started up until the time of the collision, according to your best estimate?

A. 6-8 seconds.

Q. Are you sure about that 6 to 8 seconds?

A. No, no. I can't be sure about 6 to 8 seconds, or the distance, really, because of the time which has elapsed since that time, and the fact that I don't remember those things.

Q. As a matter of fact, you don't know how many seconds it took, do you?

A. No, I don't.

Q. So your six to eight seconds is a pure guess?

A. It is an estimate; yes—which is true about anything.

Mr. Brumley: I move to strike that latter part out.

The Court: Yes; strike out that latter part of the answer; "which is true about anything."

Q. How many times did you look to the left approaching that crossing or when you were in a stopped position?

A. At least once.

Q. That is the only time that you remember, isn't it?

A. Yes.

Q. What is that?

A. Yes.

Q. And that was at the time that you came to a stop?

A. Yes.

Q. 25 to 30 feet from the track—15 to 20 feet from the track?

A. Yes.

Q. At the time of the collision you were about over the first rail?

A. As an estimate, yes.

Q. That is you yourself?

A. Yes.

Q. When you saw this black mass, as you described it, or large mass, what did you do, if anything?

A. I didn't do anything.

Q. Was that mass on the crossing?

A. It must have been.

Q. No; I ask you to give us your answer: was it? If you don't know, say so.

A. Yes.

[fol. 65] Q. It was on the crossing, was it?

A. Yes.

Q. How far from you was it when you first saw it?

A. It was there. It was the same place I was, practically.

Q. Would this be correct, to say that it was very close to you when you first saw it?

A. Yes.

Q. And at that time it had come into your direct line of vision?

A. Yes.

Q. At that time you were look ahead in the direction you were going?

A. Well——

Q. Isn't that right?

A. No.

Q. Where were you looking?

A. I turned to look at this mass.

Q. I mean at the moment you saw the mass you were looking straight ahead in the direction you were going?

A. No.

Q. What did you do before you saw the mass?

A. I turned my head to see what was making a noise.

Q. What noise?

A. The train moving.

Q. Did you hear the train moving?

A. I heard the noise accompanying the train in motion, yes.

Q. How long had you heard that?

A. When I turned to look.

Q. When you turned to look did you see the black mass?

A. Yes.

Q. Is that the first time you turned to look?

A. No.

Q. After you started up?

A. Well, I wouldn't say yes and I wouldn't say no, there.

Q. But you can't say that you looked between the time that you started up and the time that you saw this black mass immediately before the collision?

A. Well, I can't say that I looked, shall I say, directly; but as one does when one drives in a position like that. It is possible that I looked.

Q. Is that the first time that you heard the train, just before you saw the black mass?

A. Yes.

[fol. 66] Q. What kind of sound was it?

A. Well, it is a matter of wheels on rails, and possibly a little rattle here and there, maybe.

Q. Hadn't you heard that when you were in a stopped position?

A. No.

Q. Hadn't you heard that between the time that you started up and the time that you got to the first rail?

A. No.

Q. Was it a loud noise when you did hear it?

A. No.

Q. It was loud enough to call your attention to it, wasn't it?

A. Yes.

Q. And it was loud enough so that you turned your head toward the left, wasn't it?

A. Yes.

Q. Do you remember this question and answer at the time of your examination before trial, on page 25, referring to the mass: "Q. Was it a large mass, as you remember it? I mean like the tender of an engine? A. I couldn't distinguish what it was. It was, shall we say, a mass, and it was large enough to come up to my direct field of vision."

Do you remember that question and that answer?

A. Yes.

Q. And is that answer correct?

A. Yes.

Q. And then over on the next page, do you remember these questions and answers:

"Q. Did you look after you started up from the stopped position? Did you look to the right at all? A. I don't know.

"Q. When you saw that mass did you step on it to get across? A. I don't know that, either."

Do you remember those questions and those answers?

A. Yes, sir.

Q. And then above on the same page:

"Q. Could you see that it was moving? A. No, I don't believe so, as I remember it. I don't remember whether [fol. 67] I saw it moving or not, but here the engine element comes in there. I would say I couldn't see that it was moving.

"Q. Is that the first time you looked toward the left after you started up from the stopped position? A. I don't know."

Is that answer correct?

A. That is correct.

Q. So you don't know whether you looked once or twice toward the left prior to the collision?

A. That is right.

Q. But you did hear the rattle of wheels?

A. Yes.

Q. How far did the headlights on your car show up on the road ahead?

A. That, again, is a pure estimate—150-200 feet.

Q. That was a two-lane highway, so-called, wasn't it, that you were on?

A. Yes.

Q. And about how wide was it?

A. I would estimate it was about 20 feet.

Q. Did the headlights of your car spread out beyond that width of 20 feet?

A. Yes.

Q. How much?

A. I don't know.

Q. When you were in that stopped position that you described, 15 to 20 feet from the track, did the headlights of your car show the railroad track to the left of the highway.

A. No.

Q. Are you sure about that?

A. Well, while although it is an estimate I would say partially sure, yes.

Q. You are either sure or not sure, aren't you?

A. That is right.

Q. You are not sure, are you?

A. No.

Q. Whether the headlights of your car, as you stood there in a stopped position, showed up any of the track to the left of the highway?

A. That is right.

Q. Did you make any experiment afterward to ascertain that?

A. No.

Q. To the left of the highway and before reaching the [fol. 68] railroad track there was an overhead light, wasn't there?

A. Yes.

Q. Did you notice that light before the accident?

A. Yes.

Q. And that light was lighted, wasn't it?

A. Yes.

Q. Did that show the railroad track at all to the left of the highway?

A. No.

Q. Was it a clear night?

A. Yes.

Q. I show you this Defendants' Exhibit A for Identification and ask you whether that shows the physical situation as you approached the crossing. This is taken in the daytime, of course. Does it show the railroad sign on the right of the crossing and the approach to the railroad track and the general layout at that point?

A. Yes, it does.

Q. And that shows the road in the direction that you were driving?

A. Yes.

Q. And looking at that photograph, the train came from your left?

A. Yes.

Mr. Brumley: There is no purpose in this photograph except to show the general physical situation.

Mr. Allen: There is no objection. I think this tag ought to come off.

Mr. Brumley: I think so, too.

The Court: It may be marked.

(Defendants' Exhibit A for Identification now received in evidence.)

Mr. Brumley: Before I show this to the jury, let me ask you one or two questions.

Q. On this Defendants' Exhibit A, the sign that you referred to as first calling your attention to the railroad [fol. 69] track, is the sign on the right, on the right of the picture, isn't it?

A. Yes.

Q. And looking down here toward the center of the picture there is a bridge?

A. Yes.

Q. Over a stream, is there not?

A. Yes.

Q. And where you say you came to a stop was between the bridge shown on this photograph and the railroad track beyond?

A. Yes.

Q. While the jury is looking at that I will show you this photograph which has been marked Defendants' Exhibit B for Identification. It is a view nearer to the railroad

track, and I ask you whether that is a correct representation of the physical objects in the vicinity of that grade crossing.

A. Yes.

Mr. Allen: That is a daylight picture, too, isn't it?

Mr. Brumley: That is a daylight picture. All right; I will offer that in evidence. Excuse me, do you want to see this, your Honor?

The Court: No; I will look at them after the jury has seen them.

(Defendants' Exhibit B for Identification now received in evidence.)

Q. This defendants' Exhibit B, Mr. Hoffman, also shows on the right a large sign, "Railroad Crossing. Stop, Look and Listen." That was there at the time of the accident?

A. Yes.

Q. You saw that sign, didn't you?

A. I don't know.

Q. The sign that was—it was—

A. It was above the light provided by my headlights.

Q. I see. And on the left is a light strung to a pole. Is that the light that you mentioned as being lighted that night?

A. Yes.

[fol. 70] Q. That is to the left of the highway on this pole?

A. Yes.

Q. In the left-hand side of the photograph?

A. Yes.

Q. Is it true that for 50 feet anyway—for at least 50 feet—coming toward that railroad crossing, the highway is practically level?

A. No.

Q. What is it?

A. It is coming in the direction I was; coming downgrade to the railroad.

Q. All the way to the railroad track?

A. Oh, no; not all the way to the railroad track, but—oh, within a few feet—

Q. Is it level just before you get to the railroad track?

A. Practically speaking, yes.

Q. Is it level for a distance of at least 25 feet from the railroad track?

A. Yes.

show you another photograph, Defendants' Exhibit Identification, which would appear to be still closer track, and ask you whether that is a correct representation of the physical objects.

is.

another daytime picture?

s, that is.

rumley: I will offer that in evidence.

llen: There is no objection.

endants' Exhibit C for Identification now received
(ce.)

rumley: I might wait one minute for the jury to
the photographs.

court: You should look at it faster than that, gentle-
didn't know you were taking so long. Mr. Juror,
you can look at it faster than that. You can look
on. All I want you to do is get a glance at it now.
jury room you can look at it as long as you want to.

Q. Mr. Hoffman, you left the hospital May 27th?

and from there you went to Brooklyn?

and Dr. Copeland was your doctor at the hospital in

since the accident, or since you left the hospital,
often have you seen Dr. Copeland?

I have seen him twice at the hospital since I left.

When was the first time?

The end of June on my way up to Cooperstown, New

and when was the second time?

the beginning of September.

and those are the only two times since leaving the
that you have seen him?

When you came down to Brooklyn after leaving the
did you see a doctor in Brooklyn?

or family doctor?

How often did you see him?

A. Four or five times.

Q. And what period did they cover?

A. Well, they covered the month I spent in Brooklyn.

Q. That is the last part of May and the first part of June?

A. Well, say the month of June.

Q. Yes. You haven't consulted him since June?

A. No.

Q. I mean your Brooklyn family doctor?

A. That is right. No, I haven't.

Q. You have had no doctor in Troy?

A. No medical doctor, no.

Q. And since leaving the hospital, then, the only doctor you have seen in reference to your injuries was Dr. Copeland and your family doctor in Brooklyn?

A. Yes.

Q. And this post graduate work which you do at the college is hard study, isn't it?

A. Yes.

Q. It requires a good many hours a day?

A. Yes.

Q. How many courses are you taking?

A. At present I am taking three.

[fol. 72] Q. And you are living there at the college?

A. Yes.

Q. After the accident have you examined the car, the automobile?

A. I have seen the car, yes; but I haven't really examined it. I have seen it.

Q. At the garage?

A. Yes.

Q. When was that?

A. I would say the middle of May.

Q. I show you this photograph, Mr. Hoffman, and ask you whether that is the general appearance of the car as you saw it in May?

A. Yes. Yes.

Mr. Brumley: I offer that in evidence.

Mr. Allen: No objection.

(Photograph marked Defendants' Exhibit D in evidence.)

Q. At the time of this accident did you wear glasses, Mr. Hoffman?

A. No.

Q. Were you in good health?

A. Yes.

Q. You had been in a previous accident, hadn't you?

A. Yes.

Q. Was that an automobile accident?

A. Yes.

Q. How long before?

A. Four and a half, five years.

Q. Where was that?

A. Well, that was in New York State, I would say 4 or 5 miles west of Troy.

Q. Were you driving?

A. Yes.

Q. Was it a collision with another car?

A. No.

Mr. Allen: I object to it as immaterial.

The Court: Yes; sustained.

Mr. Brumley: I except, your Honor.

The Court: I will not let you go into the type of accident.

Mr. Brumley: I am not doing it.

The Court: If this is offered for the purpose of showing some injuries that are claimed—that is all it could possibly be for.

[fol. 73] Mr. Brumley: That is all I am coming up to right away.

The Court: I will let you show that he had an accident, and then you can go in and ask him what injuries were claimed in that accident.

Mr. Brumley: That is all I am coming to.

Q. You went to the hospital, didn't you?

A. Yes.

Q. What injuries did you sustain at that time?

A. A fractured skull.

Q. How long were you in the hospital?

A. A month; one month.

Q. What hospital was that?

A. The Samaritan Hospital in Troy, New York.

Q. And what doctor treated you?

A. Dr. Harvey.

Q. Harvey?

A. Yes.

Q. Do you know his full name?

A. Peter Harvey.

Q. Did you have any other injuries as a result of that prior accident?

A. Well, I had a cut, yes, in the back of my leg.

Q. Which leg?

A. The right leg.

Q. Where in the right leg was the cut?

A. Above the knee.

Q. How deep was the cut, or how badly was it cut?

A. It was a—say a piece of flesh was cut loose, hanging, more or less; still held on one end.

Q. How long were you under treatment for that accident—for the injuries sustained in that accident?

A. The month in the hospital.

Q. And no treatment after that?

A. That depends on your conception of "treatment".

Q. I mean medical treatment.

A. No, no medical treatment.

Q. Were you out at that time?

A. Yes.

Q. Did you continue your studies after that month?

A. No.

[fol. 74] Q. How long were you out?

A. I was out until the following fall.

Q. What was the date of the accident?

A. Say March.

Q. March; and then you stayed out until the following September?

A. That is right.

Q. You were not able to go back until September; is that right?

A. That is right.

Q. Did your leg heal up?

A. Yes.

Q. And at the time of this accident you were not suffering from any effects of the injuries to that leg?

A. No, no.

Q. Were you at the time of this accident suffering from any after-effects of the fractured skull?

A. No.

Mr. Brumley: That is all.

Redirect examination.

By Mr. Allen:

Q. Mr. Hoffman, Mr. Brumley has shown you certain pictures, A, B, and C, of the location where the accident happened.

The Court: I did want to clear something up, Mr. Allen; do you mind? I think the jury would like to clear this up, too.

Mr. Allen: No. Go ahead.

By the Court:

Q. This is a series of pictures, apparently, A, B, and C. I think I am a little confused, and I think possibly the jury is, too, and we will clear it up right away. Looking at A, you were going along the right-hand side of that road, where it says, "Single Line", is that right?

A. That is right.

Q. That is the sign you say your reflector showed?

A. Yes.

[fol. 75] Q. Remember that one, gentlemen.

A. That is the first one.

Q. Now we take B. Is the right-hand side of the road there the same side of the road you were on, as you went up to the railroad track?

A. I would say yes.

Q. There is a house. I will show you. There is a house there.

A. Yes.

Q. You see that house in this picture A, and you see it in B, don't you?

A. Yes.

Q. And in B it is closer; is that right?

A. Yes.

Q. Well, then, of course in A and B the right-hand side of the road are the same; is that right?

A. Yes, sir.

Q. There may be a difference here. I don't know. Look at that again and make up your mind whether the right-hand side of the road is on the right side that you were on as appears on A and B, or is the right-hand side of the road over to the left in C.

A. Here it seems to me the right-hand side is the same as the right in those two.

The Court: Is it the same, Mr. Allen?

Mr. Allen: Yes. I understand it is.

The Witness: It is the location of that barn, you see.

The Court: No—I don't care.

Q. In other words, you were on the right side of the road that is hardly visible in C?

A. That is right.

Q. So the series of pictures all show the same direction closer and closer to the track?

A. Yes.

The Court: That is all I want to know. Now I have that clear. That third one was a little turned around. I don't know—I couldn't tell from the picture.

Mr. Allen: I think I started a question and I will withdraw that.

The Court: Now you can go ahead.

[fol. 76] By Mr. Allen:

Q. Mr. Hoffman, at the time of your injury, on December 25, 1940, you stated you had never been over this road?

A. That is right.

Q. Mr. Brumley has shown you these three pictures, A, B, and C, and you have identified them generally as showing the locality where the accident occurred?

A. Yes.

Q. After you got out of the hospital or while you were still in the hospital, did you drive past there with anybody?

A. Yes.

Q. With whom?

A. My father.

Q. Was that still while you were in the hospital?

A. Yes.

Q. When you were already able to get about?

A. I was able to move about.

Q. When you were able to move about but you didn't get out or stop the car or do anything about the place?

A. That is right.

Q. So what you have given is your recollection of what you saw of the scene when you made this casual trip through there afterward with your father; is that right?

A. Yes.

Q. You hadn't been there at any other time?

A. No.

Q. Looking at Exhibit A, this sign which his Honor has referred to, showing "Single Line",—

A. Yes.

Q.—is the one which you say you saw when your headlights reflected on it?

A. Yes.

Q. That has an illumination at night; is that it?

A. Well, reflected illumination.

Q. Reflected illumination?

A. Yes.

Q. There is a bridge between that sign and the track; is that right?

A. Yes.

Q. The track itself, when it crosses the highway, is not visible in Exhibit A, is it?

A. No, it is not.

[fol. 77] Q. There is a slope or declivity from the road down to the track; is that correct?

A. That is right.

Q. Exhibit B is a view of the same general situation, although the camera is nearer to the railroad track?

A. That is right.

Q. Of course, you don't know how far back the camera was placed on any of these pictures, or where it was located?

A. That is right.

Q. In this picture, Exhibit B, you can see the railroad track?

A. Yes.

Q. Exhibit C is apparently a picture taken up nearer to the track with the camera more off to the side; isn't that correct?

A. Yes, yes.

Q. So you saw only a portion of the right driveway on the highway; is that right?

A. That is right.

Q. Apparently this picture is taken with the camera focused more or less down the track; is that right?

A. Yes. Yes, that is apparent.

Q. At the time that you came to a stop 15 or 20 feet from the first track, from the first rail, can you say whether or

not the part of the car where you were seated was between this light on the pole and the railroad track? Do you get me?

The Court: Do you understand his question?

Q. Do you understand what I mean?

The Court: I think he put it plainly. Where you sat in the car and you stopped, as you said you did, 15 or 20 feet, was where you were sitting past that light as you were going?

Mr. Allen: That is what I meant.

The Court: If you can't say, just say so.

The Witness: I can't tell. I really can't tell.

The Court: From that picture you really can't tell [fol. 78] whether the light is 15 or 20 feet from the track or farther?

The Witness: That is right.

By Mr. Allen:

Q. Mr. Brumley showed you this picture of the automobile marked Defendants' Exhibit D. Did you see the automobile or the wreck of the automobile on the same day that you made this trip with your father, do you recall?

A. Yes.

Q. And where was this automobile which you have identified in Defendants' Exhibit D—at what place, do you remember?

A. Well, it was in Mr. Troy's—the yard of his garage. It is a regular garage in West Stockbridge.

Q. In West Stockbridge?

A. Yes.

Q. You didn't know Mr. Troy, did you?

A. No, I didn't.

Q. I show you this picture, Mr. Hoffman, and ask you whether that is another view of the automobile at Mr. Troy's garage, showing more from the rear of the automobile as you saw it on that day?

A. Yes, it is.

Mr. Allen: I offer that in evidence.

Mr. Brumley: No objection.

(Photograph marked Plaintiff's Exhibit 2 in evidence.)

Q. Will you look at this picture, which is a view of the automobile from a little different angle, and tell me whether

that is a fair representation of the automobile that you saw outside of Troy's garage?

A. Yes, it is.

Mr. Allen: I offer that in evidence.

Did they see your picture, too, Mr. Brumley?

[fol. 79] Mr. Brumley: Yes, I think so.

(Photograph marked Plaintiff's Exhibit 3 in evidence.)

Q. Mr. Hoffman, you told Mr. Brumley that this light on the left of the road that is upon the post was lighted that night when you approached it; is that right?

A. Yes.

Q. You recall seeing that light, do you?

A. I can't say as I recall it; but I have seen the light there in the pictures, and I assume that it was lit.

Q. As you recall, did that light there that night reflect down at all upon the railroad track?

A. No, it didn't.

Q. The railroad track when you saw it was shown by your own headlights; is that right?

A. That is right.

Q. I believe you told Mr. Brumley that your headlights would throw a little farther to the side of the road 20 feet wide; is that right?

A. Yes.

Mr. Brumley: I object to that. He didn't say a little farther. He said farther but he didn't care to say how far. I think that is his testimony.

The Court: You had in mind that the farther your lights throw the farther they will go to the side, the more distance you are from the car and the more distant away from the car, the more they will go to the side. Everybody knows that.

By the Court:

Q. You have two series of lights on the car?

A. Yes; an upper and depressed beam.

Q. Have they got the side beam?

A. No.

Q. Some cars have the side beam; some cars have the side beam that throw as much as 40 or 50 feet to the side.

A. I know.

[fol. 80] Q. Did your car have that?

A. No.

By Mr. Allen:

Q. You had a straight, did you call it?

A. Straight and depressed.

Q. You had which on that night?

A. The upper beam.

The Court: They are a straight beam, anyhow, Mr. Allen. Some of them have the side beams.

Mr. Allen: Yes.

Q. Mr. Brumley asked you when you stopped and looked whether you could see the track to your left; I mean besides what was at the roadway. Did you see any of the track to the left?

A. No.

Q. This light on the pole didn't show that?

A. That's right.

Q. As you started up to go toward the track in first speed just how were you looking?

A. Well, I was looking where I was going.

The Court: Mr. Allen, I don't think you are entitled to that. I think you are entitled to once on that. You see what that opens? That opens new cross examination.

Mr. Allen: All right. I will withdraw it.

The Court: You have gone over that, anyway.

Mr. Allen: Yes, sir. That is right.

Q. This doctor who took care of you here in Brooklyn was Dr. Hollenbeck, wasn't he?

A. Yes.

Q. This cut that you had on your right leg was on the upper part of the leg above the knee?

A. In the first accident? The first accident, you mean?

Q. Yes.

A. No, that was above the knee, but right under in here (indicating).

[fol. 81] Q. There were no bones broken, were there?

A. No.

Q. Were there any broken bones in your left leg?

A. No.

Q. How long before it healed up on your leg?

A. Three months. That is an estimate, of course.

Q. I see. Did it leave a scar? Did it?

A. Yes.

Q. Did you have any difficulty getting around after that healed up?

A. No.

Q. Did you have any lack of motion in your leg at all?

A. No.

Q. And as far as your head injury is concerned, when you went back to school or college in the fall were you able to carry on your work in the usual manner?

A. Yes.

Q. How was your standing in college? Was it pretty good?

A. Well—

Q. I notice you wear a Sigma Psi. What is that?

A. Well, that is a thing which does not necessarily say you are tops in studies but you are good; you have a wide knowledge in science and you might necessarily do research.

Q. It is an honorary thing?

A. Well, yes; it is an honorary thing.

The Court: Are your marks high? You know whether they are high or low.

The Witness: Well, they are high.

Q. After your first accident, Mr. Hoffman, did you take part in athletics at all?

A. Yes.

Q. It didn't have any effect in your playing whatever games you took part in; is that right?

A. Yes.

Recross-examination.

By Mr. Brumley:

Q. As a result of your first accident you were unconscious for a considerable period of time, were you not?

A. Yes.

[fol. 82] Q. How long?

A. Two weeks.

Q. It was, then, about two weeks before you became conscious?

A. Before I was—well, I could remember tomorrow what I did the day before.

Mr. Brumley: That is all.

By Mr. Allen:

Q. That is your first accident?

A. Yes.

Q. You don't recall how long you were unconscious on the second accident, except what they told you?

A. That is right.

Mr. Allen: All right. That is all.

The Court: I think that is all.

All right. You may step down. I think you have gone as far as you can today. Have you got some other witness you want to put on?

Mr. Allen: I have two doctors from West Stockbridge. The first one will be very short.

The Court: All right. We will take him.

WILLIAM E. PERSING, called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct examination.

By Mr. Allen:

Q. Doctor, you are a physician and surgeon duly licensed to practice in Massachusetts, are you, Doctor?

A. Yes, sir.

Q. For how long have you been practicing there?

A. Ten years.

Q. And where do you practice, in what part of Massachusetts?

A. In West Stockbridge.

[fol. 83] Q. Do you specialize in anything or have you a general practice?

A. I do general practice in the country.

The Court: Those fellows up there don't specialize; they do everything.

Q. Were you practicing there on December 25, 1940, Doctor?

A. I was, yes, sir.

Q. On that night were you called to the scene of an accident at what is called the Elkley Buckley crossing there in West Stockbridge?

A. Yes, sir.

Q. That is the name given to that crossing, it is, Elkley Buckley?

A. That is the old name, yes. Very seldom used.

Q. I see. About what time, Doctor, were you called?

A. Somewhere after 6 o'clock.

Q. Were you at home?

A. No, I was at a neighbor's house.

Q. I see, and you got there, I presume, as soon as you got word—as soon as possible after you got word, is that right?

A. Yes, sir.

Q. When you got there what did you find?

A. Well; when I arrived at the crossing, of course, traveling partly in a northerly direction on the side of the crossing, which would be to my left as I came out of the village, lying down toward the gutter and alongside, close to a telegraph pole, was a woman whom I examined first.

Q. Was she in the car or outside?

A. She was lying on the ground outside the car.

Q. Lying on the ground?

A. I examined this woman just to ascertain whether she was alive or dead and she was dead, and that is as far as I examined her at that time.

Q. Yes. Later she was removed from the scene, do you know, or weren't you there then?

A. No. I had left before she was removed.

[fol. 84] Q. I see, and then what next did you do?

A. Then I went down the track in the direction known as State Line probably about thirty steps to where a car—the track at this place is elevated a little with a fill in. There is a bank on the north side, which would be to my right side going down. There is a swamp off in there. The bank is 12 to 14 feet, something like that, maybe more. It is about like that—(indicating). Lying on the side of this bank was a car. It was pretty well damaged. It had been compressed or hit or something, and back of the steering wheel in this car was a man.

Q. Yes.

A. I examined him at that time and he was unconscious. He was bleeding very profusely from scalp wounds on the left side of his face. He was pinned back of the steering wheel and the steering column. His pulse was of very good quality for a man who had been injured as severely as he

was. Being unconscious, I didn't administer any medication to him at that time. As I said, he was pinned-back of the wheel in the steering column. His right leg between the knee and the femur was distorted out of place, and the bone was protruding through his trousers, and that was bleeding quite profusely.

The next question was about getting this patient out of the car. I had considerable help around there. Splice here I know that was finally accomplished by. He was on the lefthand side of the car, that is, the driver's side, which was the side of the car that was facing the track but not parallel with the track. The front part was down in the bank a little more, throwing it off on an angle like that (indicating). The hind part of the car could be opened and was opened and by tearing the seat out from under this patient we were finally able to get him out from the lefthand of the car, which we could only open about that much at a time (indicating).

Q. And he was then taken away?

[fol. 85] A. We had a cot there and a station wagon and we simply wrapped him in blankets and put him on this station wagon, and I applied some bandages to him to control some of the excessive bleeding around his head, and we immediately started for Pittsfield Hospital, which is about thirteen miles away.

Q. When you got down there, Doctor, were there some people over there?

A. Yes, sir.

Q. How were they working, with the use of flashlights, did you see?

A. Oh yes. I used my own flashlight.

Q. It was dark there?

A. Oh, yes.

Q. Were the other men working with flashlights, do you remember?

A. Not everybody had a flashlight but there was half a dozen or more.

Q. At that time did you notice any train there on the track?

A. There was a train beyond the accident.

Q. About how far would you say?

A. Well, I should say the back end of the train was 50 or 60 feet beyond the accident.

Q. And where were you?

ere I was working?
ond where you were?
ere I was working.
ere you were working on the car?

• Did you go to the hospital with the party?
sir.
you have learned since that it was Howard Hoff-

, sir.
I when you got to the hospital what was done im-

ll, the patient was immediately treated for shock.
aken to the operating room and treated for shock
ual method, such as hot blankets, hot waters and
and then Doctor Copeland was called in to the case
eon. I don't do that type of work.

he come to the hospital?

came to the hospital.

Q. About what time would you say that Doctor
came?

t to the hospital?

, I don't know as I looked at my watch that even-

, and did this doctor take charge of the patient?

sir. He was the surgeon in charge of the case.
you from time to time come to the hospital after-
was it—

I came to the hospital every day.

Did you have anything to do with the treat-
rwards?

I assisted in all things and sometimes I took care
r the day when Doctor Copeland was away for the
evening.

len: Your Honor, I think I ought to stop.

ourt: Go as far as you can. Do you want to get
ight, Doctor?

itness: I figured on it.

ourt: Go as far as you can. Are you going to be
on the cross?

umley: I think so. I don't know how much the
going to be.

Mr. Allen: He was Doctor Copeland's patient and he was there.

The Court: You are not going to have Doctor Copeland?

Mr. Allen: Oh yes, we are going to have Doctor Copeland.

The Court: If you are going to have Doctor Copeland I don't know whether you need him or not, but he said he does not treat this kind of case. That is why he gave it to Doctor Copeland.

Mr. Allen: Yes, but he says that he was there from time to time.

The Court: If you are going to have one it is useless to [fol. 87] have two, because you are only going to tell what Doctor Copeland did, aren't you?

The Witness: Yes, sir.

Q. You had nothing to do personally with the taking of any X-rays, did you?

A. No.

Mr. Allen: That is all in view of the situation with Doctor Copeland.

The Court: Yes.

Cross-examination.

Mr. Brumley:

Q. What time did you get down to the crossing, Doctor?

The Court: He said after 6 o'clock.

Q. How long after six?

A. I don't know as I looked at my watch.

Q. I don't know either. I am asking you to tell us if you know.

A. No.

Q. Was it 6:30?

A. I don't know.

Q. Was it 7?

A. No, it wasn't 7 o'clock.

Q. Some time between six and seven, then, is that right?

A. That's right.

Q. Who called you?

A. Well, I was up at a neighbor's house and a fellow by the name of Lawrence Sonsato called me.

Q. Where were you, how far away from the crossing, when you were called?

A. Oh, less than a half mile.

Q. Between this crossing and the station at West Stockbridge?

A. Oh no. No. I live farther than that, about a block farther than that.

The Court: No. He wants to know where you were at the time you were called, how far from the crossing. The night [fol. 88] you were called you were not at home; you were at a neighbor's house.

The Witness: Well, I was just across the street.

The Court: The neighbor's house was across the street from your own house?

The Witness: Yes.

Q. What is the name of the neighbor?

A. His name was Junkers; Reverend Junkers. He is dead now.

Q. Before you were called did you hear this train go by?

A. No, sir.

Q. When you got to the scene of the accident did you observe any light on the train?

A. There was a light on the train, yes, sir.

Q. Where was that light?

A. It was on the engine.

Q. In which direction was it pointing at that time?

A. Toward us.

Q. That is toward the crossing?

A. Yes.

Q. Did you observe whether there was any light on the tender pointing up toward State Line?

A. No, I didn't. I didn't walk down below it.

Q. How many people were there when you got to the scene of the accident?

A. Oh, I will say twenty.

Q. How long were you there?

A. I judge we must have been there about half an hour.

Mr. Brumley: I think that is all.

The Court: That is all.

Gentlemen, we are going to take a recess until Wednesday morning at 10:30. This is the first case we have had this term. I want you to follow my instructions directly.

and you are going to get yourselves in trouble if you do not. I do not want any discussion about this case by any of the [fol. 89] jurors with anybody. We have rather cramped quarters here, and I don't want you even to stand around and try to listen to anybody talking about it. I want you to have your own free judgment based on the evidence and to discuss the case for the first time in your jury room. If you do that and only that none of you will get in trouble. If you don't you are going to get into serious difficulties with me. I don't have to tell you that this is an important case to this plaintiff and an important case to this defendant. That is why the law says you ought to act that way and that is the way I am asking you and directing you to act. Return at 10:30 Wednesday morning.

Brooklyn, N. Y., November 12, 1941.

Before—Hon. Matthew T. Abruzzo, U. S. D. J., and a Jury

APPEARANCES:

(Same counsel as heretofore noted.)

LAURENCE MICHAEL BONA, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Allen:

Q. Speak up as loudly as you can in answering questions so that we all can hear and so that the jury can hear.

Where do you live, Mr. Bona?

A. I live in Farnams, Mass.

[fol. 90] Q. Farnams, Mass.?

A. Yes.

Q. How long have you lived there?

A. About six years.

Q. You have lived there since you are married; is that right?

A. Yes.

Q. Before that where did you live?

A. In West Stockbridge.

Q. Farnams is about how far from West Stockbridge?

A. 20 miles.

Q. About how long did you live in West Stockbridge?

A. Fifteen to twenty years.

Q. Does your family still live there?

A. Yes.

Q. I mean your parents and other relatives.

A. Yes.

Q. What is your business now?

A. Welder.

Q. Welder?

A. Yes.

Q. Where?

A. Pittsfield Iron Works.

Q. I don't get that. Can you hear him?

A Juror: No.

Q. Speak a little louder if you can, won't you?

A. Yes.

Q. In December 1940 where were you working?

A. United States Gypsum Company.

Q. Where, in town?

A. It was in Farnam.

Q. In Farnam?

A. Yes, sir.

Q. How old are you, Mr. Bona?

A. Twenty-seven.

Q. Do you remember Christmas day of 1940?

A. Yes.

Q. In the afternoon of that day where had you been?

A. I went to a show in Pittsfield.

Q. A moving picture show?

A. Yes.

Q. When you saw "we" tell us who you mean? Who went?

A. Myself, my wife and my sister and my brother.

Q. Your sister's name is what?

A. Edna.

Q. Your brother's?

A. Arthur.

Q. How did you go there, by automobile?

A. Yes.

[fol. 91] Q. With your automobile?

A. Yes.

Q. What kind of automobile was it?

A. 1935 Plymouth.

Q. After being in Pittsfield did you come back to West Stockbridge?

A. Yes.

Q. Did you go to any place in West Stockbridge, stop near West Stockbridge at any place?

A. We stopped at the store down in West Stockbridge.

Q. And made some purchases there; is that right?

A. Yes.

Q. About what time would you say that was?

A. Oh, around in the neighborhood of six.

Q. I show you this photograph and ask you whether that shows the vicinity in which you stopped to make these purchases that night.

A. No. Where we stopped to make the purchases is right in the main village, right in the main street.

Q. That is a picture of what, the town crossing, as you call it?

A. Yes.

Q. And about how far from that place there shown did you stop?

A. We stopped to let the train go by there. It was only right in front, on the right side of this building on here (indicating).

Q. You had been to a store that is not shown on this picture; is that right?

A. Right.

Q. And you stopped where? You say to let a train go by?

A. I stopped over this way, on this other side of the road to let the train go by.

Q. Is that a fair representation of that crossing at that time?

A. Yes.

Q. When you were there that night?

A. Yes.

Mr. Allen: I offer the picture in evidence.

Mr. Brumley: This is not the crossing, is it?

Mr. Allen: No. That is the other one.

[fol. 92] Mr. Brumley: The other one. I have no objection.

(Marked Plaintiff's Exhibit 4.)

Q. I show you this other picture. Is that another picture of that crossing which you have just referred to?

A. Yes.

Q. That is known generally as the town crossing, isn't it?

A. Yes.

Q. That is about how far from what is known as the Elkley Buckley crossing?

A. Oh, about half to three-quarters of a mile.

Mr. Allen: I offer this picture in evidence.

Mr. Brumley: I have no objection.

(Marked plaintiff's Exhibit 5.)

Q. I believe you say you stopped at this crossing to let a train go by; is that correct?

A. That's right.

Q. And on which side of the crossing, as shown in this picture, did you stop, the right or the left?

A. On the right.

Q. Where were you seated in the car?

A. The driver's seat.

Q. On the left side in the front?

A. Yes.

Q. Who was sitting alongside you?

A. My brother Arthur.

Q. Who was seated behind you?

A. My sister Edna.

Q. And your wife was seated behind your brother Arthur; is that right?

A. Yes.

Q. Did you notice particularly what kind of train it was, how many cars it had, when it passed you?

A. No, I didn't notice particularly the make-up of that train.

[fol. 93] Q. Then which way did you proceed?

A. I proceeded towards Pittsfield.

Q. Look at Exhibit 5. Does the road to the left of the crossing indicate the road which you proceeded on?

A. Yes.

Q. Does that road run down toward what is known as the Elkley Buckley crossing?

A. Yes.

Q. How does the railroad track run as regards that road?

A. It is parallel with the road.

Q. And on that side where the road was is there a sort

of embankment before you get down to the railroad in places?

A. The second crossing you mean?

Q. No. As you ride along on this road down to the second crossing is the railroad down somewhat and the ground above it?

A. Yes.

Q. As you proceeded down this street did you come to a church?

A. Right.

Q. On which side of the road in that church?

A. On the righthand side going towards Pittsfield.

Q. I show you this picture and ask you whether that is a picture of the church that you refer to.

A. Yes. That is the church.

Mr. Allen: I offer that in evidence.

Mr. Brumley: There is no objection.

(Marked Plaintiff's Exhibit 6.)

Q. Looking at this picture will you tell me whether that is a picture taken from about in front of the church as shown on Exhibit 6 leading down towards this Elkey Buckley crossing?

A. Yes.

Q. That is a fair representation of that?

A. Yes.

Mr. Allen: I offer that in evidence.

Mr. Brumley: There is no objection.

(Marked Plaintiff's Exhibit 7.)

[fol. 94] Q. The Elkey Buckley crossing is not visible from in front of the church where this picture is taken as shown in Exhibit 7, is it?

A. No.

Q. There is a dip or declivity there.

A. Yes.

Q. As you were proceeding that evening on which side of the road were you?

A. On the righthand side going up.

Q. To the right of the white line?

A. Right.

Q. When you were at or about this church, as shown on Exhibit 6, did anything happen to your car?

A. Yes. Something broke in the rear end of the car.

Q. And what did you do then?

A. Well, I opened the door on my side and my brother opened the door on his side, and we stuck our head out and kept going along and was listening.

Q. Were you coasting then?

A. Coasting down towards the crossing.

Q. There is a down grade toward the crossing?

A. Just a slight down grade, yes sir.

Q. Did you know whether there was a railroad crossing up there?

A. Yes, I knew it well.

Q. You were familiar with it?

A. Right.

Q. And when you had your doors open and listening for a sound in the rear of your car were you listening for any other sounds that you might hear there?

A. I was listening for the train.

Q. And did you hear any whistle from any train?

A. No.

Q. Did you hear any bell from any train?

A. No.

Q. Did you hear any noise?

A. I heard a bang from up front of us but at the time we didn't know what it was.

Mr. Brumley: Heard what?

Mr. Allen: "Heard a bang from up in front of us but at the time, we didn't know what it was."

[fol. 95] Q. You coasted down this down grade toward the crossing?

A. Yes.

Q. What then did you first notice after you had heard this bang and when you were going down?

A. We got down on the right side of the crossing and I could see the car over on the side of the road in the ditch there. I could see steam coming out of the car and the car was on the side of the road in the ditch.

Q. I show you this picture and ask you whether that shows the location?

A. Yes, that's it.

Q. (Continuing:) —where the car was, as you saw it, when you came to the track?

A. Yes.

Q. Whereabouts down back of this post there (indicating)?

A. In the swamp there.

Q. The first post that is shown to the right of the railroad track?

A. It was in back of that, yes.

Mr. Allen: I offer this in evidence.

Mr. Brumley: What is this for, Mr. Allen?

The Court: Where the car that apparently was struck was found.

Mr. Brumley: There is some material down here; that doesn't purport to show where the car was.

Mr. Allen: No, I don't know what that is. It was by that post.

Mr. Brumley: All right, I have no objection.

Mr. Allen: I offer it in evidence.

(Marked Plaintiff's Exhibit 8.)

Q. This picture, Exhibit 8, shows the railroad track going towards State Line, doesn't it?

A. It does, yes.

Q. The track going towards State Line?

A. Yes.

Q. And the West Stockbridge crossing or the town cross-
[fol. 96] ing would be over here to the right (indicating)?

A. Yes.

Q. What did you do when you got down to the tracks?

A. When I got there I pulled over to the left side and stopped the car and got out and we went over to the cracked-up car down in the ditch.

Q. Did you cross over the railroad track?

A. I crossed the road. I drove the car across the road.

Q. You drove across the road and just parked your car on the right side, right?

A. Right.

Q. You were then on the left of your car nearest to where this automobile was in the ditch?

A. Right, yes.

Q. You got out you say?

A. Yes, I got out.

Q. What did you do?

A. I got out and looked over there and looked up the track and saw the light of the train up the track.

Q. You saw what?

A. The light of the train up there.

Q. Up the track about how far?

A. About 200 feet.

Q. Up towards State Line?

A. State Line, that's right.

Q. Was that light shining towards you?

A. Yes.

Q. From the front of the engine?

A. No, it was from the engine shining down this way (indicating).

Q. What did you do then?

A. I went over and saw the woman laying there on that side of the car, and there was a hub—part of the automobile—the head or some part of it off that, and I took that part of her and straightened her up some, and some of the railroad men came down, the brakeman and things like that. We carried her up on the bank and we went over into the car and there was a fellow in the car, and we started to work on him to get him out.

Q. When you first ran over there did you have any light with you?

A. When I first run over, then I couldn't see much down in there, and then I hollered to my brother to bring me my flashlight which was in the car.

Q. Did your brother bring it to you?

A. Yes.

[fol. 97] Q. When you went over to this wrecked automobile did you use your flashlight?

A. Yes.

Q. And was it dark in there?

A. It was fairly dark down in there, yes.

Q. You say some men from the train came up; is that right?

A. Yes.

Q. Were you the first man at the scene of the accident?

A. Yes.

Q. And then did other people collect afterwards?

A. Yes, a whole crowd gathered around.

Q. About how long did it take you before you got the man out of the car, would you say?

A. It was all of a good hour.

Q. Did you observe the track there that night, whether there was any debris or parts of the automobile or any clothing or anything else on it?

A. Yes. It started from the side of the road there going up the track and toward the car.

Q. Will you point out on Exhibit 8 where you say these articles were?

A. It started right here from the edge of the road to the corner of the track.

Mr. Brumley: I can't hear.

The Witness: It started right in here and scattered up this way and in toward the car. It was along in here (indicating). You see, right there (indicating).

Mr. Allen: May I have that marked?

Q. Will you point out again, please?

A. Yes, sir. In here (indicating). It started on the corner on the side of the road here and went up this way and some over the track, and the car was right in here, in there (indicating).

Mr. Allen: May I have that indicated somewhere on this? [fol. 98] The Court: Put it with a pen.

Mr. Allen: Is that all right, Mr. Brumley?

Mr. Brumley: Yes.

The Court: Put an X there where it starts.

Mr. Brumley: You do it.

The Court: You had better let that dry now.

Q. What did you see there?

A. I think it was oranges there and fruit and all.

The Court: Keep your voice up. You see, the juror on the right wants to hear.

The Witness: Yes. I beg your pardon.

A. (Continuing:) There was oranges there and parts of clothes. There was instruments of some sort—some medical instruments or something in a case, part of a radio, I think it was, around there. It was all scattered right along the road and the track.

Q. Along the track toward?

A. Towards State Line.

Q. Toward State Line?

A. Toward State Line, on the edge of the road.

Q. Now, did you look at this roadway over here where this center white line is?

A. Yes.

Q. Were there any such things there at all?

A. No.

Q. Did you see some clothes there at all?

A. Right on the edge of the road. It started from the edge of the road up.

The Court: Will you suspend a minute please.

(There was a brief recess.)

Q. Mr. Bona, after you got this gentleman out, who turned out to be Howard Hoffman, what did you do with him?

A. We got him out. We stayed there and we waited a few minutes until this mail truck came up from West Stock-[fol. 99] bridge from the garage, which was just a few seconds and we put him in that and we drove to Pittsfield to a hospital.

Q. Did you go along with him?

A. Yes.

Q. Who else went, do you remember?

A. It was one of Troy's drivers along. I don't know what his last name is. There was Lena Tomolina and myself.

The Court: Just a minute. Would that Juror No. 12 like to sit up here? I notice you cup your ear. Would you like to sit up here? Come on up and sit up here. It would be better for you. Come on up here. I have noticed he has had his hand up and it is pretty hard to do that.

(Juror No. 12 moved over to the front of the box.)

The Court: Now I think you will hear better.

Q. Do you know what was done with the lady's body, Mr. Bona?

A. It was laid up there on the side of the road and then they took her away afterward.

Q. You didn't have anything to do with it?

A. No. We helped carry her up, and then we left her up there and then we worked on the fellow that was in the car.

Q. I believe you say when you got down to the automobile it was steaming.

A. Yes, there was steam coming out of the car and everything there.

Q. Gasoline?

A. Gasoline and alcohol and whatever was in the radiator.

Q. When you got down to the crossing and you were driving down to the crossing and pulling over there with your car to the right were any bells being rung there by the train at all?

A. No.

Q. At any time that you got there did you hear any bells being rung?

A. No.

Q. From the time you started to listen on the way down did you hear any bell or whistle from that train?

A. No.

[fol. 100] Q. Were you listening?

A. Yes.

Q. Was there any talk going on in your car after you heard this noise in the rear or were you all quiet?

A. No, we were all quiet. We were listening.

Mr. Allen: That is all.

The Court: All right, Mr. Brumley.

Mr. Brumley: Oh, I am sorry.

Cross-examination.

By Mr. Brumley:

Q. Where did you say you are now working, Mr. Bona?

A. Pittsfield Iron Works.

Q. You were not working at that place on the day of the accident?

A. No.

Q. How long have you been working at Pittsfield Iron Works?

A. About four months.

Q. Where do you live now?

A. In Farnham, Mass.

Q. Where?

A. Farnham.

Q. Farmers?

aham.
aham?

have given a statement to Mr. Diamond?

did you give that statement?

March, I think.

you give more than one statement to him?
one statement that I know of.

signed that?

re did you give that statement?

my house.

often have you come to New York in connection
case?

is the first time.

did you come?

erday.

haven't been to New York in connection with
until yesterday?

is right.

Q. You didn't come down several weeks ago in
with the case?

the town crossing—may I have that?

handed to Mr. Brumley by Mr. Allen.)

inuing.) You say you stopped?

the crossing; is that right?

the before the crossing.

the before the crossing?

did you stop at that place?

opped. We were in the car, and we stopped and
the before the crossing.

did you stop a little before the crossing?
we stopped?

did you stop, yes.

ust stopped there a little before the crossing;
wife, my sister, and brother. We had something
we stepped.

Q. Looking at Plaintiff's Exhibit 5, did you stop just to the right of the railroad track shown in that exhibit (handing same to witness)?

A. Down in here, mostly, around the other road where we stopped (indicating).

Q. Eventually you went over that track at the crossing shown in Plaintiff's Exhibit 5?

A. In this picture.

Q. Did you not?

A. Yes; right after the train went by.

Q. Did you stop also very near the crossing when the train went by?

A. Within 100 feet from the crossing.

Q. And you saw the train go by at that time?

A. I didn't pay attention to the train going by. The train went by. I heard the train go by. I didn't look at the make-up of the train or nothing when he went by.

Q. You stopped about 100 feet from the crossing because the train was going over the crossing; isn't that right?

A. Yes. We stopped there. We knew the train was going by.

[fol. 102] Q. How did you know the train was going by?

A. We could hear it coming.

Q. How far away before it got to the crossing did you hear it coming?

A. Oh, two or three hundred feet, right by the station.

Q. So you stopped about 100 feet from the crossing because you heard the train coming toward the crossing when the train was two or three hundred feet away; is that right?

A. I didn't stop especially waiting for the train. I stopped and had a talk with my wife in the car. We stopped then.

Q. But didn't you say you stopped about 100 feet from the crossing because you heard the train?

Mr. Allen: I object to that.

The Court: I will let him answer. He wants to know whether you stopped because you heard the train.

The Witness: We didn't stop because we heard the train. We stopped as we were there. We heard the train as we stopped.

Q. When you heard the train it was about two or three hundred feet away from the crossing?

A. Down by the station it is about 200 feet, yes.

Q. And you stopped and stayed stopped about 100 feet from the crossing until the train went by, didn't you?

A. That is right.

Q. Was it a long train that went by?

A. No; short. It went by quick.

Q. Do you know how many cars there were in that train?

A. No, I didn't notice.

Q. As it went by the crossing didn't you look at it at all?

A. I didn't look at the train, no.

Q. The train came from your left, didn't it?

A. Yes.

Q. Did you see it at all as it approached the crossing?

A. I was not looking at it.

[fol. 103] Q. Did you see any light from the train as it came toward the crossing?

A. No.

Q. What were you doing all that time that the train was going by?

A. I was talking to my wife.

Q. Do you know whether the engine was the first part of the train that went over the crossing?

A. I don't know.

Q. Can you give us any idea how many cars there were in the train?

A. It must have been short because it went by quick. If it was a long train, it will take quite a while to get by.

Q. Do you know the speed of the train as it went by?

A. Moving right along. It was not so fast.

Q. What do you mean by "right along"?

A. Well, I can't say the exact speed of it, because I wasn't even looking at it when it went by, but it went by quick.

Q. You paid no attention to the train, then, as it went by that crossing in the town?

A. I wasn't looking at the train, no.

Q. The only thing you know about the train is that it made a noise and you heard it when it was down at the station?

A. About at the station, yes. I heard it coming?

Q. What kind of noise was it?

A. Regular noise of an engine.

Q. Did you hear the puffing of the engine?

A. Yes.

Q. Could you hear the rattle of the wheels?

A. Just as a certain noise. I don't know whether it is a noise that the engine makes. I don't know whether it is the wheel rattling or the puffing, whatever it was. I know it was a noise.

Q. What time of the night was it, Mr. Bona?

A. Around 6 o'clock.

Q. It was dark?

A. Yes.

Q. And clear?

A. I don't remember if it was clear. I know it was dark.

[fol. 104] Q. There were three other people in your car, were there?

A. Yes.

Q. Including your wife?

A. Yes.

Q. Who was on the seat beside you?

A. No. She was on the back seat.

Q. You were driving?

A. Right.

Q. When you reached the Catholic church shown in one of the photographs the rear end of your car broke, didn't it?

A. Yes.

Q. What called your attention to it?

A. When I stepped on the gas and it wouldn't go no place.

Q. What was that?

A. We stepped on the gas and it wouldn't go no place; just the motor would race.

Q. Did it make any noise?

A. A slight clicking in the rear end; yes.

Q. What do you mean by "a slight clicking"?

A. When two gears go by with a broken tooth they click every time they go by.

Q. It was a clump, clump sound, wasn't it?

A. It wasn't very loud.

Q. I didn't ask you whether it was very loud. I asked you whether that would describe it, "clump-clump, clump-clump."

A. Something like that.

Q. The whole rear end was broken, wasn't it?

A. No, it was just the pinion gear that was broken.

Q. Did you stop at the top of the hill opposite the Catholic church?

A. No.

Q. You continued on?

A. I pushed the clutch in and got rolling along down the grade.

Q. You opened the window on your side?

A. I opened the door.

Q. The door; and you looked back, didn't you?

A. I stuck my head out and listened and looked back and I went back.

[fol. 105] Q. And you were listening to the "clump" in the car, the rear end?

A. Yes. I was listening for that, too.

Q. I didn't ask you whether you were listening for that, too. I asked you whether you were not listening for the noise from the rear end of your car.

A. I looked back to see what—if I could see anything.

Q. Did you see anything?

A. It was all dark and I couldn't see nothing.

Q. Did you hear something?

A. I heard that click in the rear end.

Q. And you continued to hear that all the way down the hill, didn't you?

A. You could hear it going down, yes.

Q. How did you go down the hill? In neutral?

A. Yes; coasted down.

Q. And coasted across the railroad track?

A. That is right.

Q. And after the rear end broke or whatever happened to the rear end down to the railroad track you had the door of the car alongside you, that door alongside you, open, didn't you?

A. Yes.

Q. Did you see the car that was struck, Mr. Hoffman's car, at any time prior to the accident?

A. No.

Q. Were you at any time going down the hill toward the railroad track from the Catholic church looking ahead?

A. Yes, I was looking ahead.

Q. What?

A. Sure, I was looking ahead.

Q. Were you looking ahead all the time going down the hill?

A. No. I said I was looking back to the rear end once in a while.

Q. Did you do that several times going downhill?

A. I looked back several times and then kept going ahead until I heard the noise.

Q. Did you look ahead several times?

A. Yes.

Q. Until you got to the railroad track?

A. Right.

[fol. 106] Q. At no time did you see a car coming towards you?

A. No.

Q. Going down the hill did you at any time see the railroad train cross the railroad tracks?

A. No.

Q. So going down that hill you saw neither the automobile of Mr. Hoffman nor the train?

A. No; not before it was hit.

Q. Before the collision?

A. No.

Q. Were you the first to arrive at the scene of the accident?

A. Yes.

Q. Do you remember Mr. Helfrich of the railroad company seeing you after the accident?

A. What is his name?

Q. I beg your pardon?

A. I don't remember the name.

Q. You remember a man coming to see you from the railroad company?

A. Yes.

Q. And talking to you and your wife about the case?

A. Yes.

Q. Do you remember that he asked you this question and you gave him this answer: "Q. But you wouldn't say the train did not whistle before it got to the crossing? A. I wouldn't say whether it did or did not."

A. I don't remember giving that.

Q. Did you say that?

A. No.

Q. You didn't say that?

A. No.

Q. Do you remember this question by Mr. Helfrich and this answer by you: "Q. From where you were in West Stockbridge would you say the train didn't whistle at any

time from the time it went through West Stockbridge until the time of the accident? 'Mr. Bona: I couldn't either—' meaning, 'I couldn't say.' 'Did you tell him that?

A. I don't remember telling him that.

Q. You don't remember telling him that?

A. No.

Q. But you won't say that you didn't tell him that?

A. I don't think I said that.

[fol. 107] Q. Did you hear any crash at the crossing?

A. We heard a noise before we got to the crossing, a bang, or crash; whatever you want to call it. We didn't know what it was at the time.

Q. Is that what first called your attention to the accident?

A. I didn't pay no attention to it because I didn't know what it was. I just heard this bang and I just kept going toward—driving that way, toward the crossing.

Q. How far away were you from the crossing before you knew there had been an accident?

A. Oh, 20, 30 feet; 50, or something like that.

The Court: How far were you from the crossing when you heard the bang?

The Witness: Oh, near the church.

The Court: You were near the church? We were not there. We don't know how many feet it is from the railroad crossing.

The Witness: Oh, I should say offhand four or five hundred feet, something like that.

The Court: Is that the top of the hill when you started to go down-grade?

The Witness: That is before you get to the top of the hill, the church is.

The Court: You are not at the top of the hill when you get to the church? There isn't very much grade there, is there?

The Witness: It just pitches a little bit.

The Court: Do you have to pass the church before you get downhill?

The Witness: Yes.

By Mr. Brumley:

Q. Where were you when you heard the crash?

A. Right up around the church.

[fol. 108] Q. Do you remember Mr. Helfrich asking you this question and your making this answer: "Q. In other words, how far were you from the crossing before you knew there had been an accident? Mr. Bona: Oh, about 67, 70, or 80 feet. It was down the grade there." Did he ask you that question and did you make that answer?

A. I think I did.

Q. You think you did?

A. Yes.

Q. Don't nod your head. Say yes or no.

A. Do you want to repeat that question, please?

Q. "Q. In other words, how far were you from the crossing before you knew there had been an accident? 'Mr. Bona' (meaning you), 'Oh, about 67, 70, or 80 feet. It was down the grade there.'"

A. Yes.

Q. He asked you that question and you made that answer?

A. I am pretty sure I did.

Q. Did he ask you this question and did you make this answer: "Q. Did you hear the crash between the train and the car? 'Mr. Bona: No, I didn't hear no crash or anything.'"

A. No, I never said that.

Q. Did he ask you that question?

A. I don't remember. I don't think he did.

Q. Did you make that answer?

A. No.

Q. You didn't make that answer?

A. No.

Q. As you went by the church before your attention was called to the rear end of your car the windows of your car were closed, were they not?

A. I don't remember.

Q. Were they closed when you stopped short of the town crossing, what you call the town crossing?

A. No. One was open, because I was smoking. I just threw a cigarette out before that.

Q. Did you close the window after that?

A. I don't remember whether I did or not.

Q. What?

A. I don't remember whether I did or not.

[fol. 109] Q. Now, let me see whether I can refresh your recollection: "Mr. Helfrich: You had all the windows closed

when you went past the church?" Then your wife made an answer, according to our record——

Mr. Allen: One moment; I must object to Mr. Brumley testifying as to what his records are. That is something we ought to have proof of.

Mr. Brumley: No, I am not trying to give an answer. I am just trying to keep the continuity.

The Court: Yes, but do not refer to the record. The point is you are only allowed to ask questions as to what the proof is. We are not concerned with what your records show right now.

By Mr. Brumley:

Q. "Mr. Helfrich: You had all the windows closed when you went by the church? That is when you started to open the windows? Mr. Bona: Yes." Did he ask you that question and did you make that answer?

A. No, I didn't make that answer, because if I told him anything I told him I opened the doors when we got to the church.

Q. "Q. Up to that time all the windows in the car were closed? Mr. Bona: Yes." Did he ask you that question and did you make that answer?

A. I don't remember it.

Q. Is that true, that up to that time—that is, up to the time you got to the church—all the windows in the car were closed?

A. I don't think they were. I am pretty sure my brother had his open on his side. You can ask him that, when he gets here.

Q. You don't know, do you?

A. I ain't sure of that.

The Court: Was yours open?

The Witness: I ain't sure of that.

[fol. 110] The Court: You are not sure of that?

The Witness: No.

By Mr. Brumley:

Q. Going down the hill after your attention was called to the rear end you were thinking more about the rear end trouble than you were about the railroad track?

A. I was thinking of the track, too.

Q. I say you were thinking more about the rear end trouble than you were about the train?

A. No, I wouldn't say that. I was thinking of both, because I know it is a bad crossing there. I know it.

Mr. Brumley: I move to strike that out.

Mr. Allen: I submit it is responsive.

The Court: What was it?

Mr. Allen: May I have the question read?

The Court: Yes, read the question.

(Last question read.)

Mr. Allen: He asked for a comparison and now he has got it.

The Court: Now, wait a minute. Who made that answer? Did he make that answer right from the record there or from the stand?

Mr. Allen: From the stand.

The Court: Oh, no. Strike that out. It is for the jury to say that. It is not for him to say.

Mr. Allen: No, he was asking for the comparison, your Honor, and now he has a right to say that.

The Court: No, he cannot give us the reasons for that about the crossing. Strike out the latter part of that, too.

Q. Did Mr. Helfrich ask you this question and did you make this answer: "Q. You were thinking more about your [fol. 111] rear end trouble than you were about the railroad train? A. That is it."

A. No, I didn't make that answer.

Q. You didn't answer that question in that way?

A. No.

Q. Do you remember this question by Mr. Helfrich and your answer: "Q. In other words, the noise of your car and thinking of your own troubles took your mind entirely off anything that was going on on the railroad tracks? Mr. Bona: Yes. When you see trains you don't stop to listen to what they are doing." Did he ask you that question and did you make that answer?

A. No.

Q. Do you remember his asking you that question?

A. No.

Q. Did he ask you this question: "Q. When you are having troubles like you were having you are kind of mad about having hard luck and you were paying more attention to that than to anything on the railroad?"

A. No, I don't remember that.

Q. What is that?

A. I don't think he asked me that.

Q. And did you in answer to that question say, "Yes"?

A. No.

Q. You didn't say, "Yes"?

A. No.

Q. Did he ask you this question and did you make this answer: "Q. And you were not listening for bells or whistles at that time, were you? Mr. Bona: No."

A. Yes, I was.

Q. Did he ask you that question and did you make that answer?

A. I don't remember him asking me that question.

Q. Did you answer that question in that way?

A. No, I didn't answer it that way; no.

Q. Did he ask you this question and did you make this answer: "Q. You were thinking about your rear end troubles; is that it? Mr. Bona: That is it."

A. I didn't make no such answer.

[fol. 112] Q. You didn't?

A. No.

Q. When you got down to the crossing and had stopped your car on the other side of the track you went over to see what had happened, didn't you?

A. Yes.

Q. And this automobile was on the right-hand side looking toward State Line on the right-hand side of the track?

A. On the right-hand side of the railroad track?

Q. Yes.

A. On the left-hand side of the road. It is right in the corner.

Q. Right-hand side of the railroad tracks?

A. Yes.

Q. And your left-hand side of the road?

A. Yes.

Q. Going in the direction that you had been going; is that right?

A. Yes, yes.

Q. And it was not toppled over, was it?

A. It was all flattened up.

Q. No; but I mean it hadn't—the car—

A. The top was still on top. It was still up straight.

Q. How far was the automobile from the highway, approximately?

A. Oh, I wouldn't know; 50, 60 feet; something like that; 40, 50, 60. I know I didn't measure it. I don't know exactly.

Q. Was it near the railroad or was it near a telegraph pole?

A. It was down in back of that pole there.

Q. I show you Plaintiff's Exhibit 8 and ask you whether the car was just beyond the telegraph pole shown in that photograph. I am pointing to it now, to the right of the railroad track, the first telegraph pole beyond the highway to the right of the railroad track.

A. It was quite a ways back from that. It was back further than that pole quite a ways.

Q. Beyond the pole?

A. Yes.

Q. How far beyond the pole?

A. 15, 20 feet; something like that.

Q. The pole is close to the edge of the road, isn't it?

A. Well, it is near the edge of the road. It ain't too far away—10, 20 feet; something like that.

[fol. 113] Q. When you got there had any of the train crew come back to the automobile?

A. No; they were coming down the track.

Q. So you were the first to arrive at the automobile?

A. Yes.

Q. And after the accident did you at any time notice how many cars there were on the train?

A. I noticed up the track and I saw this one light up there—this light.

Q. Where was that light?

A. It looked as if it was in the middle of the track facing down.

Q. Was it on one of the cars?

A. I imagine it was.

Q. Did it seem to come from an engine?

A. I couldn't say just what it was coming from. It was either the engine or the tender—whatever it was, that was facing down, this light.

Q. Do you mean toward the crossing?

A. Yes.

Q. Was it a bright light?

A. Fairly bright; yes.

Q. Did it show up on the crossing?

A. Not too much; but it shows. It was facing the other way.

Q. What do you mean, that the light was facing the other way?

A. Well, the train was not quite straight there with the crossing, with the road.

Q. I see. How far was that light from you, approximately?

A. Oh, two or three hundred feet—150; between 150 and 300 feet.

Q. And did that light appear to you to come from the rear end of the train?

A. It came from part of the train; I know that.

Q. Was there any car between the light and you?

A. No, there was nothing between the light and the crossing that I could see.

Q. So that light was unobstructed?

A. Yes.

Q. Did you see any other lights on that—

A. I saw the light of the lanterns of the brakeman coming down the track.

[fol. 114] Q. Did you see any light on the train pointing toward State Line?

A. No, I didn't see no other lights.

Q. You didn't go up to the State Line end of the train, did you?

A. They wouldn't let us go up.

Q. What?

A. They wouldn't let you go up.

Q. The light that was on the train was a big headlight, wasn't it?

A. It was a big, good-sized light, and shining down, yes. I don't know what light it was, but it was a good-sized light shining toward the crossing.

Q. You didn't know Mr. Hoffman, did you, before the accident?

A. No.

Q. Did you see him after the accident in the hospital?

A. Yes, I went to see him once in the hospital.

Q. When was that?

A. Gosh, I don't remember. Just wait a minute—last winter some time; last spring.

Q. What is that?

A. It was this spring some time.

Q. Did you see him more than once in the hospital?

A. No; just once.

Q. Was it in February or March or April or May or what month? Will you tell us?

A. I don't remember just what month it was.

Q. Did you talk to him about the accident?

A. Not much.

Q. Did he tell you what he did prior to the accident?

Mr. Allen: I object to the conversation.

The Court: Yes; sustained.

Mr. Brumley: Exception.

The Court: I think the questioning was very general, Mr. Allen.

"Did he tell you what he did before the accident?" That might have been twenty years ago; I don't know. I don't know that.

Mr. Brumley: I mean did he tell him what he did before the accident.

{fol. 115} Q. I mean did he tell you what he did before the accident?

A. We didn't talk.

The Court: Wait a minute. This is your own witness on this, Mr. Brumley.

Mr. Allen: I object to it.

The Court: I will allow the question but you know you are bound by the answer, Mr. Brumley. This is your witness now on this phase.

Mr. Brumley: I take it, your Honor, I am trying to—

The Court: No; my ruling, Mr. Brumley, is that this is new matter, and if you go into it you are bound by it, and if you get an adverse answer I am not going to permit you to put any questions out of that record that would seem to contradict what he might say here. That is my ruling. If you want to proceed now according to that ruling, go right ahead.

Q. Did he tell you what he did immediately before the accident?

A. No.

Allen: Objection. This is cross examination.

Court: I will allow it under my ruling. Did he say

(answer read.)

Did you discuss with him at all what he did approach-
intersection?

He talked very little about the accident.

Court: No, no. You must pay attention to the ques-
Did you talk at all about what he did approaching
intersection—yes or no?

61 The Witness: No, I don't think we discussed
all.

Did you discuss with him anything or did he tell you
of what he did prior to the collision approaching
sing?

don't think he did.

Bramley: I submit, your Honor, that in view of the
of this witness, being called by the plaintiff, I should
ed to try to refresh his recollection on this point
conversation between him and the plaintiff.

Court: I rather think you are bound by the answer,
Bramley. It might be that you are entitled to refresh
because his answer is not entirely a nega-
r.

the Court:

said you don't think you discussed that with
that right?

s.

Bramley: In another place he says he discussed
him.

Court: I will permit you to go ahead. Each ques-
I have to take care of itself. Don't make any answer
question until counsel has had a chance to object;
witness. Go ahead. Put your question. You are
this question on the ground that you are entitled
sh his recollection. Is that right?

Bramley: Yes.

Court: Proceed.

By Mr. Brumley:

Q. Do you remember saying this to Mr. Helfrich, referring to what Mr. Hoffman said to you at the hospital: [fol. 117] "He—that is Mr. Hoffman—said he stopped at the crossing."

A. I don't remember saying anything like that to him.

Q. Did Mr. Hoffman tell you that?

A. No.

The Court: Speak louder.

Q. Did Mr. Hoffman at the hospital say that he saw the back of the train?

A. No.

Q. Did he tell you that the train had gone by and that he started up and it hit him?

A. No.

Q. Mr. Hoffman didn't tell you that?

A. No.

Q. Did Mr. Hoffman tell you that he thought the train was going in the other direction?

A. No.

Q. Did Mr. Hoffman tell you that he stopped for the train?

A. No.

Q. Did Mr. Hoffman tell you that he stopped before he got to the crossing and he thought the train was going away from him?

A. No.

Q. Did Mr. Hoffman tell you at the hospital that he stopped and then went on?

A. No.

Q. Did Mr. Hoffman say this to you, in words or substance, at the hospital: that he stopped and he saw what he thought was the back of the train going the other way and he started up and he said that is all he remembers?

A. No.

Q. You did, in answer to one of my questions, say that you didn't discuss the facts of the accident with Mr. Hoffman except a very little, I think you said; what did Mr. Hoffman tell you about the accident?

A. It was very little that I could remember he said about the accident. Mostly he talked about was—he said how he

was felling and all that, and he talked mostly about school, where he was over in school.

The Court: Your recollection is now that you didn't talk about the accident at all?

[fol. 118] The Witness: I didn't talk about the accident because I was—you know, I happened to be there when it happened, and I knew about his wife, and I didn't want to bring the memory.

Mr. Brumley: I don't get that.

The Court: He didn't want to bring the memory up to him about his wife.

Q. You went to the hospital in Pittsfield to see him, didn't you?

A. Yes.

Q. How long were you at the hospital at that time?

A. Oh, 15, 20 minutes.

Q. Was anybody with you?

A. No.

Q. Was anybody but you and Mr. Hoffman there?

A. There was his nurse there when I first went in.

Q. What was her name; do you know?

A. I don't know.

Q. You know that Mr. Helfrich did ask you questions, don't you?

A. Yes, he was up there asking questions.

Q. That was in July of this year, wasn't it?

A. I don't know when it was, exactly.

Q. And did you tell him anything about the conversations between you and Mr. Hoffman?

A. I don't think I did.

Mr. Allen: Haven't we just covered that, your Honor? That has been covered extensively.

The Court: Yes, I think so.

Q. I am asking you whether you told Mr. Helfrich about the conversation as between yourself and Mr. Hoffman.

The Court: That is what you have been referring to.

Mr. Brumley: I have been referring to the conversations between him and Mr. Hoffman.

[fol. 119] The Court: I suspected that you have been telling us that that is what he said to Mr. Helfrich, isn't it?

Mr. Brumley: That is immaterial. I have been asking him right along whether Mr. Hoffman has said in words

or substance these things. Now I am asking him whether he didn't repeat to Mr. Helfrich what Mr. Hoffman had said.

The Court: All right.

Did you tell Mr. Helfrich that you had a conversation with Mr. Hoffman in which Mr. Hoffman told you something about how the accident happened?

The Witness: No. It was all the talk of the town up there—

The Court: No, no. You have to answer the question. You see, the question is addressed to what you told Mr. Helfrich.

By Mr. Brumley:

Q. Did Mr. Helfrich at any time when you saw him ask you about a conversation that you had with Mr. Hoffman at the hospital as to how the accident happened?

A. I don't know.

Q. You don't know?

A. I don't know if he did or not.

Mr. Brumley: I submit, your Honor, that I ought to be allowed, in view of the position of this witness and what has developed, to cross examine him as to what we claim he said to Mr. Helfrich.

The Court: I think you have done that. I think I have allowed you to do just that.

Mr. Brumley: I want now to ask him this question—

The Court: Oh, yes, you can ask him anything you want. [fol. 120] But I have got to rule on these questions. I think I haven't stopped you just yet. You cannot complain just yet. You might complain later on but I have given you all the latitude so far.

Suppose we take a five-minute recess.

Members of the jury, stand around in the hall, and don't talk to anybody about this case. You don't know who might be listening. And don't let anybody talk to you about the case. You cannot go into the jury room, because there is another jury there, so you will have to stand out in the hall, which I admit is rather narrow quarters.

(Short recess taken.)

By Mr. Brumley:

Q. Mr. Bona, when Mr. Helfrich saw you was that at your own home?

A. Yes.

Q. And your wife was present?

A. Yes.

Q. And did he have with him a stenographer?

A. He had another fellow with him; yes.

Q. And while you and Mr. Helfrich were talking this other man took notes, did he?

A. Yes.

Q. Do you remember Mr. Helfrich's asking you this question and your making this answer: "He said he stopped for the crossing. A. Yes, he said he stopped for the crossing, and what he saw was the back of the train and thought that the train was gone by and he started up and it hit him, and that is all he could remember. He was in tough shape."

Mr. Allen: I object, your Honor.

The Court: I will allow it.

Did you make that answer to that question?

The Witness: No.

[fol. 121] Q. Do you remember this question by Mr. Helfrich and this answer: "Q. So he claims he stopped by the crossing and saw the back of the—— Mr. Bona: —train." Did Mr. Helfrich say that to you and then did you say "train"?

Mr. Allen: The same objection, your Honor.

The Court: I will allow it.

Did you say that?

The Witness: No, not that I remember.

Q. Not that you remember; is that it?

A. No, I don't remember it.

Q. Do you say that you didn't say that to Mr. Helfrich?

A. Yes.

Q. Mr. Helfrich, continuing the sentence: "Engine, and thought it was going in the other direction? Mr. Bona: Yes." Did you say that?

Mr. Allen: The same objection.

The Court: The same ruling.

Q. What?

A. No.

Q. Then did Mr. Helfrich ask you this question and did you make this answer: "And then he started up? Mr. Bona: Yes, and he started. That is all he could remember."

Mr. Allen: The same objection.

The Court: The same ruling.

A. No.

Q. No?

A. No.

Q. Later did Mr. Helfrich say this to you: "You say you talked to Mr. Hoffman after the accident and he stated that he stopped before he got to the crossing and he thought the train was going away from him." Do you remember that question?

[fol. 122] The Court: Mr. Brumley, I must limit you even on cross-examination, because that question was asked just a few minutes ago.

Mr. Brumley: Yes, but I am putting it otherwise.

The Court: The very same thought was in the very same question three or four questions before.

Mr. Brumley: Yes.

The Court: I cannot permit the same question to be asked again and again.

Mr. Brumley: No; but I was asking him before whether Mr. Hoffman did not say that to him and now I am asking him whether he did not say that to Mr. Helfrich.

The Court: That is the very same question you asked him. You asked him three or four questions back and he said No.

Mr. Brumley: Didn't he tell it later to Mr. Helfrich?

The Court: He said he never told it to Mr. Helfrich.

Isn't that what you say?

The Witness: Yes.

By Mr. Brumley:

Q. Did you say this to Mr. Helfrich: "He was" (referring to Mr. Hoffman) "he saw what he thought was the back of the train going the other way and he started up, and that is all he remembers."

Mr. Allen: I object to that.

The Court: That very question was asked.

Q. At another time did you say that to Mr. Helfrich?

The Court: He says he never said it.

[fol. 123] Mr. Brumley: If he says he never said it—

The Court: That is what he says.

You say you never said that?

The Witness: Yes.

Q. Right after you came to a stop you went across the road to see what had happened, didn't you?

A. What is that?

Q. Right after you came to a stop you went across the road to see what had happened?

A. That is when I went to the cracked-up car, yes.

Q. And it was at that time you noticed this headlight?

A. I noticed this light shining down the track.

Q. At that time?

A. I noticed when I crossed the track.

Q. At the highway?

A. When I was going across the track I noticed the car there and I noticed the light up the track. That is—

Q. That is, by "the light up the track," you mean headlight or the light on some part of the train; right?

A. Right.

Q. And in answer to one of Mr. Allen's questions, you said, I think, that you didn't hear the bell, or a bell, after the accident. You were not listening to any bell at that time, were you, after the accident?

A. I was going to cross the track there. If there was a bell or anything ringing, you could have heard it.

Mr. Brumley: I move to strike that out.

Mr. Allen: I think it is responsive.

The Court: No, it is not responsive. I will allow him to say. Did you hear any bell as you went across the track and you saw this locomotive with some kind of light on it? Did you hear any bell at that time?

The Witness: No.

The Court: Is there an automatic bell at this crossing?

[fol. 124] The Witness: No, there is nothing there.

The Court: You mean there is no automatic bell there, and whatever bell you have at that crossing would necessarily have to come from the engine; is that right?

The Witness: That is right.

The Court: You know what I mean. At some of these crossings there is an electrical contrivance.

The Witness: Yes, I know what you mean.

The Court: I am not making any point of it. I am just trying to get it clear. It had me confused and I don't

know whether the jury might be confused, because I cannot see any point about a bell after the accident.

Mr. Brumley: No. Mr. Allen asked the question.

Mr. Allen: Mr. Brumley made the point of it afterward.

The Court: That is not proof. You know that.

Mr. Brumley: There was a statement in the opening that there was no bell.

The Court: All lawyers say things in openings that are not necessarily true.

Mr. Allen: Right.

The Court: As far as I am concerned, and as far as this jury is concerned, I am going to tell them that whether there was a bell ringing after the accident has no relationship. It is whether there was a bell before the accident. All right Proceed.

Mr. Brumley: I have just one question.

By Mr. Brumley:

Q. Didn't you some time ago come to New York and try to find Mr. Diamond's office?

[fol. 125]. A. I came to New York and tried to find Mr. Diamond's office, but not especially come for that purpose.

Q. You were in New York and tried to find Mr. Diamond's office?

A. I was going to stop in to see him, yes. He told me if I ever come to New York to come in and stop up and visit him.

Q. How long ago was that?

A. It was during the summer.

Mr. Brumley: I should like to ask for the statement that this witness signed.

The Court: All right. And he can offer it in evidence after you are through with it.

Mr. Brumley: If I use it.

Mr. Allen: It is produced.

The Court: After you see it, it will be offered in evidence.

Mr. Brumley: I have had that up a number of times.

The Court: I don't allow counsel on either side to ask for a paper and look at it, and then decide that he doesn't want it. When you look at it, you will have to offer it.

Mr. Brumley: I don't think I want the pesky thing, then.

Redirect examination.

By Mr. Allen:

Q. Mr. Bona, you were asked whether you remember this man Helfrich. Do you remember his name?

A. I don't remember.

Q. Because when he first asked you, you didn't remember a man by that name.

A. I don't remember the name; but when he told me who it was, it comes to me.

Q. Do you see him in court?

A. No.

Mr. Brumley: He is not here.

[fol. 126] Q. And the man who was with him—do you remember what his name was?

A. No.

Q. Did you know his name?

A. I don't think I would know him if I would see him.

Q. Do you remember how often Mr. Helfrich came to your house?

A. He came twice to my house.

Q. Did he have this other man with him the second time?

A. I think he had a different one each time.

Q. Did both of those men apparently write something down in a book?

A. The first time, yes.

Q. The first time?

A. Yes.

Q. Could you tell whether that was shorthand writing or longhand writing or what?

A. He was writing down something. I didn't pay no attention what was written down.

Q. After it was written down did he show you what was written down and ask you to sign it?

A. No.

Q. About how long afterward did Mr. Helfrich come down again to see you?

A. It was about here a month and a half afterward. He came down on the job where I was working.

Q. On the job, to see you?

A. Yes.

Q. Did anybody else come down to see you between the

time that Mr. Helfrich came to your house and he came on the job to see you?

A. No.

Q. And when he came on the job to see you was he alone or did he have another fellow with him?

A. He had another fellow.

Q. Did he ask you about the accident that time?

A. Yes. He started up, but I was working that day, and I told him I couldn't take time off to talk to him then. I was working on the job, and I couldn't take time off to talk to him then; to come up to the house that night.

Q. And he came up to the house that night?

A. Yes.

Q. With this other fellow?

A. Yes.

[fol. 127] Q. Did this fellow write down anything then?

A. I wasn't in the room then when he was talking with my wife.

Q. Did this Mr. Helfrich say anything about your business?

A. What is that?

Q. Did he say anything about your business, what the railroad did up there?

A. He started to tell me just what he did. I can't tell just the way he said it. He said, "You are working here. You know the New York New Haven brings all the stells in here and brings all the food and everything else to Pittsfield." That is what he told me. And I walked away from him.

Q. Were you present in the house when he had some talk with your wife about coming to New York?

A. Yes.

Q. What did he say about that?

A. He asked my wife, "Have you been over there on a trip to New York?" My wife said, "No." My wife said to him, "I would like a trip to New York." He said, "Well, if you said you heard the bells and whistles, we would give you a trip to New York."

Q. Was that about five or six weeks ago?

A. Yes; about four or five weeks ago. It is in that neighborhood.

Q. At any time did he show you anything that he had written out, purporting to be what you said, and ask you to sign it?

A. No, not me.

Mr. Allen: That is all.

[fol. 128] NEWALL COPELAND, being called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct examination.

By Mr. Allen:

Q. Doctor Copeland, you are a physician and surgeon duly licensed in the State of Massachusetts, are you?

A. Yes, sir.

Q. May I ask how long you have been practicing?

A. Sixteen years.

Q. Where did you receive your medical education?

A. I graduated from McGill University medical school.

Q. That is in Canada?

A. Montreal, Canada.

Q. And after that what subsequent connections have you had?

A. Since then in the Montreal General Hospital; four years residency in the Hillcrest Hospital in Pittsfield, and subsequent short post-graduate training at Mayo Clinic, in Rochester, Minnesota.

Q. Have you specialized in any branch of your profession, Doctor?

A. General surgery.

Q. Are you at the present time connected with any hospital?

A. Yes.

Q. What?

A. House of Mercy Hospital as attending surgeon and the St. Luke Hospital in Pittsfield.

Q. Are both those hospitals in Pittsfield, Doctor?

A. Yes, sir. that's right.

Q. Doctor Copeland, on December 25, 1940, was Howard F. Hoffman, the plaintiff in this case, brought to the House of Mercy Hospital?

A. Yes.

Q. And about what time was it that you saw him there if you, remember approximately?

A. Shortly after 7 o'clock p. m.

Q. And where was he at that time?

A. He was in the operating room.

Q. Will you describe what you found on your first examination [fol. 129] of him, Doctor.

A. He was lying on an examining table in one of the operating rooms. There was a good deal of blood about his face and head, from fairly extensive lacerations of the left side of his face interior to the ear, under the ear, involving part of the external ear and under his chin. They were also—

Mr. Brumley: I don't want to interrupt but I think if the doctor is reading from records—

The Court: Yes, Doctor, you are not allowed to read from records.

The Witness: I am not reading this, sir.

The Court: At any time that you get stuck keep that in your hand. You had better listen. Any time that you get stuck you can stop and refresh your recollection from your record but then you will have to close it when you testify. That is the rule here. You understand that; is that right?

The Witness: Yes, sir.

Q. Continue, Doctor.

A. And other minor smaller lacerations about the face. There was also a great deal of blood over his right leg with a rent in the clothing through which blood was coming. The right trouser leg was considerably torn, and there was an extensive laceration of the right leg above the knee through which fragments of bone were protruding. He was completely unconscious and very pale. Evidently he had suffered from some degree of loss of blood and was in profound shock.

Q. What do you mean by that?

A. Pulse was poor. Pulse was of poor quality and respirations were shallow, and in a state of surgical profound shock of that nature. Those were the major aspects as I first saw him.

Q. What did you do then, Doctor?

[fol. 130] A. We removed—we examined these lacerations. When I say "we" I mean the attending nurses and others.

The Court: You had better put it as to what you did, Doctor, "I did."

The Witness: I examined the lacerations on the face. There was one which ran vertically anterior to the ear on the left side of the face down to a region just below the lobe of the left ear. There was another laceration on the ear itself, the external part of the ear, and one, as I remember, under his chin and several others.

Q. About how long was that one anterior to the left ear, would you say?

A. Approximately 2½ inches. His clothing, particularly the lower garments, were removed and attention was given to examination of the legs, which revealed, as mentioned before, the opening in the right leg just above the knee through which bone fragments protruded. It was obviously fractured, and there was also abnormal motility of the left leg above the knee about the middle portion, the middle third of the thigh.

Q. What did that indicate?

A. It indicated also a fracture of the left side bone. His left hand was swollen, and there was also some deformity in the region of the left metatarsal bone, the bone in the hand of the fifth finger indicating a fracture.

Q. And he was unconscious at the time?

A. He was unconscious. His condition was rather poor. We carried out—at least I carried out—first aid measurements in the way of suturing the face lacerations after preliminarily cleansing them and used aseptic precautions. Temporary splints in the form of wooden splints were applied to his legs, and after the laceration of the right leg was treated antiseptically as well. It was opened up and a [fol. 131] good deal of damaged tissue was removed. There were particles of foreign matter in it. These were carefully removed. It was irrigated with large quantities of saline solution to remove the dirt further, and some sulfanilamide powder was put in the wound. It was partially closed and he was returned to a room to be further treated for shock.

Q. Then your first provisional diagnosis was what, Doctor?

A. Probable fracture of the skull, compound comminuted fracture of the right femur, fracture of the left femur, fracture of the fifth metatarsal bone left. I think that was all at the time.

Q. When you say "compound comminuted fracture" will you tell the jury what is meant by "compound" and what is meant by "comminuted"?

A. The word "compound" indicates a fracture where there is a break in the continuity of the skin over the fracture and through which fragments of bone have passed or are already protruding. A comminuted fracture in simple terms indicates a splintered fracture in which there are numerous particles.

Q. I take it, Doctor, that when you made this examination and then you performed the things which you described some anaesthetic was given to the plaintiff.

A. No.

Q. Not at that time?

A. Not at that time.

Q. Later what did you do for him?

A. Well, his condition was unusually precarious. We did not feel that from the indication at that time that he might survive. He was really very gravely injured. Pulse could be scarcely obtained. He was given intravenous fluid which helped to improve the quality of his pulse and was constantly watched during that time. We had to simply place him in bed and keep him as quiet as possible with the least possible motion following that, which we felt might jeopardize his condition.

Q. Then what did you do next in connection with these [fol. 132] injuries?

A. Well, the next day the general condition was somewhat improved as far as the shock was concerned. His pulse was better, his heart action was improved, his blood pressure was better. Still he was unconscious and mumbling, moving and fairly restless under those conditions. At this time sedatives were given in the nature of morphine to keep him quiet and promote a further return to the normal state from the state of shock. This state of shock gradually diminished so that at the end of approximately 24 to 36 hours he was much improved as far as that was concerned. He remained unconscious for a total of I should say three or four to five days. I have forgotten the exact time but approximately that length of time, following which he went through a long period of coming to. There were short intervals when he would speak incoherent speech, mumbling speech, which could not be made out as

, groaning as if in pain from time to time, especially he would move, and subsequent to that at the end of approximately three weeks or thereabouts he began to take an interest in life in this manner: that when shown pictures he would point to things in the picture and mention things by name. He was still incapable of answering questions. When spoken to or asked—if he were asked—he felt he would make some completely incoherent reply which had no relation to the question asked. Following this—I can't give it in terms of days because it was a gradual process—he would answer simple questions with a very simple answer, but if it was any complicated question he couldn't answer it. He would give up and go on with a process of repeating some nursery rhyme or something that he had learned as a child. He would read—but during this same period he would read newspaper headlines—which made no impression on him whatever. They meant very little to him. Even things of major national importance had no—meant very little apparently. If he [33] were questioned about them he would agree by saying, "Oh, yes, that is so," or something of that sort. Again he improved so that his conversation was more intelligent. He would answer much more complicated questions and from that point on his mental state seemed to im-

provement. Specifically it was about January 14, 1941, before we felt a consultation with the anesthetist and one other member of the surgical staff that I could do anything in the way of attempting reduction of the fractures of his legs.

That was on January 14th?

That was on January 14th, sir.

Between December 25th and January 14th had any films been taken at the hospital?

Yes. These were so-called portable films which were taken at the bed, and these films, of course, are not as satisfactory as those which are taken on a regular X-ray table, but they were adequate for our purpose.

I am not sure that I have the right ones here, Doctor. You tell me whether these were the earlier films that were taken (handing)?

Court: No. You will have to wait, Doctor, until the shadow box.

The Witness: I am just trying to find the date on them.

The Court: Let him have the box.

While he is there, Mr. Allen, why don't you let him pick out the ones he wants, take out all the X-rays pictures which you think you will need in giving the jury a picture of these fractures and then lay them aside. Lay aside those you don't need.

Q. Yes. Here are some more, Doctor.

A. That is fine, thank you.

[fol. 134] Q. Use only those that you think are necessary, Doctor.

A. I would like to get this thing in relatively simple order so that we can go ahead with them.

The Court: We will leave that to you but don't take more than you need, Doctor.

The Witness: I think these will cover the situation. These were all taken at different dates and stages.

Q. Here are some more, if that is in the right envelope.

A. That's right. I think it probably is or it should be.

Mr. Brumley: I might be interested in this thing.

Mr. Allen: I just said that this envelope would probably be the right one.

The Witness: This is one of the chest and has no relation to us.

The Court: Doctor, suppose we withdraw you until recess and then you take out what you want. You don't need all these X-rays.

The Witness: No, I don't need all these X-rays.

The Court: And here you have got eight or nine of the first ones; you are not interested in those. Keep those in mind and keep enough of those so that you can show them to the jury as to what happened and mainly what is going to happen in the future. That is what is important. What is gone is done but what is going to happen in the future is very important, so bear that in mind. Pick out what you want and narrow them down as much as you can. It will not do any good to have all of those unless they are pertinent. You can work here quietly until the noon recess.

He will have to come back here this afternoon.

[fol. 135] ARTHUR PAUL BONA, called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct examination.

By Mr. Allen:

Q. Mr. Bona, how old are you?

A. Eighteen.

Q. That is it, keep your voice up like that so that we can all hear you. Where do you live?

A. West Stockbridge.

Q. How long have you lived there?

A. Eighteen years.

Q. You were born there, were you?

A. Yes, sir.

Q. You are the brother of Arthur Bona, are you?

A. That's right.

Q. He now lives in Farnhams?

A. Yes.

Q. You live in West Stockbridge with your family?

A. Yes.

Q. Who is there with you?

A. My mother, and father, my brother and sister.

Q. You go to school now?

A. Yes.

Q. Where?

A. Williams High School in West Stockbridge.

Q. Is this your last year?

A. Yes.

Q. Are you preparing to go to college?

A. That's right.

The Court: He is pretty young. He had better not make too many plans.

Q. After school hours do you work?

A. Yes.

Q. Where?

A. In the West Stockbridge Public Market.

Q. Stockbridge Public Market?

A. West Stockbridge.

Q. Do you remember Christmas Day 1940?

A. Yes.

Q: Had you been with your brother Laurence and his wife and your sister Edna to the pictures in Pittsfield that afternoon?

A. Yes.

Q: After being there did you return to West Stockbridge?

A. Yes.

[fol. 136] Q: And what part of the town did you go to first?

A. In the center of the village to a store.

Q: To a store?

A. Yes.

Q: And made some stop there, did you?

A. Yes.

Q: Is that somewhere near what is known as the Town Crossing?

A. Yes, it is around there, just around in front of it.

Q: Look at Plaintiff's Exhibits 4 and 5. Do those pictures show the Town Crossing so-called (handing)?

A. Yes.

Q: Where was the store that you stopped at?

A. Well, it was down the road?

Q: Down the road to the right here (indicating)?

A. Yes.

Q: To the right as shown in Exhibit 5? It went down this way (indicating)?

A. Yes.

Q: That road is shown on Exhibit 5 when you go along the track and leads up to the other crossing, the Elkey Buckley crossing?

A. Yes.

Q: And where were you seated in the car?

A. Beside the driver in the front.

Q: When you stopped up there by the Town Crossing as you call it, did a train go by?

A. Yes.

Q: Did you observe that train?

A. Yes.

Q: Do you know how many cars it had?

A. The tender, the locomotive and the caboose.

Mr. Brumley: What?

Mr. Allen: And the caboose.

Q: Which was first?

A. The tender.

Q. And then the locomotive?

A. An then the locomotive.

Q. And the caboose in the rear?

A. Yes.

Q. After that train went by there in the town crossing did your brother start up the automobile?

A. Yes.

[fol. 137] Q. Did your brother start the automobile after the train went by?

A. Yes.

Q. And you proceeded then down the road toward the Elkey Buckley crossing, did you?

A. That's right.

Q. Are you familiar with where the Catholic Church is?

A. Yes.

Q. Did anything happen to your vehicle when you reached at or about the church?

A. Yes.

Q. What did you notice?

A. Something went wrong with the rear end.

Q. Something went wrong with the rear end?

A. He pushed on the gas and the car wouldn't go.

Q. Then what did you do?

A. I opened the door on my side and listened for and I heard a slight click.

Q. Where?

A. Toward the rear, in the rear.

Q. Do you know whether your brother opened the door on his side?

A. Yes.

Q. Do you recall whether you had your window down or partly down?

A. I don't recall.

Q. When you opened the door you were about where?

A. About the Catholic church.

Q. About the Catholic church would you say?

A. That's right.

Q. When you were listening at that point you say you heard the click at the back of your car?

A. Yes.

Q. Did you hear any engine bells or whistles?

A. No.

Q. From the time you started up from the town crossing had you heard any engines or whistles?

A. I didn't.

Q. While you had your automobile door open and listening for the click and for the noise at the back were you alert? Were your senses alert as to hearing?

A. Yes.

Q. Did you hear any noise after that?

A. Yes.

Q. What?

Q. I heard a crash somewhere in the direction in front of us.

[fol. 138] Q. Ahead of you?

A. Yes.

Q. Your car continued on then, did it?

A. Yes, it did.

Q. There is a slight grade there, is there?

A. Yes, there is.

Q. And were you coasting?

A. Yes, we were.

Q. What next if anything attracted your attention?

A. Steam I think it was, rising from the side of the road opposite us.

Q. The side of the road opposite you?

A. Yes.

Q. You mean on the——

A. On the side of the wreck.

Q. Was it on the same side you were travelling or on the other side?

A. On the opposite side.

Q. When you were up there at the church and had your doors open was there any conversation in the car or were you listening for the noise?

A. We were listening for that slight click.

Q. Did anyone say anything in the car as you were going down approaching this Elkey Buckley crossing, do you recall?

A. Well, my sister, I think it was, while we were going down that hill, said, "Look out; there is a train coming".

Q. That was your sister Edna?

A. That's right.

Q. How near the track were you when you say you saw this something steaming?

A. Oh, I would say about 40 or 50 feet approximately.

Q. And did you then see any light from any train on the track or engine on the track?

A. The only lights I have seen were the lantern lights on the back of the caboose, I think it is.

Q. Those small lights on each side of the rear of the train?

A. Yes.

Q. You didn't see any headlight of any engine.

A. No, I didn't.

Q. As you came down there you didn't notice that?

A. No.

[fol. 139] Q. Where did your brother stop his car?

A. On the right-hand side of the road nearest the railroad tracks.

Q. He crossed over the railroad tracks?

A. Yes.

Q. What did he do then and what did you do?

A. He ran out from his door and went to the wreck, and I ran out of my door and did the same.

Q. And did you take anything with you?

A. I was half way there when he yelled for a flashlight, because he couldn't see. So I went back in the car and got his flashlight and I handed it to him.

Q. Was it dark around the crossing?

A. Yes.

Q. And then what did you do?

A. I stayed around there. He wanted me to go down and help him around there, so I went around the top and I tried to go down the tracks, but they wouldn't let me.

Q. Do you mean down toward State Line?

A. That's right.

Q. Didn't you help get a lady out?

A. No. I didn't.

Q. Did you see her on the bank?

A. Yes.

Q. And did you have anything to do with helping to get the man out?

A. Yes.

Q. Was your brother the first man there?

A. Yes.

Q. And you came right after that?

A. Yes.

Q. Did you see somebody come from the train which was down the track?

A. I did.

Q. About how far away would you say that train was approximately?

A. Oh, 200 feet I should say.

Q. And did these men have lanterns?

A. Yes.

Q. Did other people congregate there then?

A. Yes.

Q. About how long did you stay there?

A. I didn't stay very long. I should say about five minutes, and then I went downtown after the sheriff with another fellow who stopped by there.

Q. Who is the sheriff?

A. Mr. Troy.

Q. Is he the fellow that has the garage there that you have heard mentioned?

A. Yes.

[fol. 140] Q. Did you get him?

A. No. He was out of town.

Q. Did you get someone else?

A. His brother.

Q. He is the postmaster there?

A. Yes.

Q. Did he come back?

A. Yes.

Q. And when you got back had they gotten the man out yet?

A. Not yet.

Q. Then what did you do after that?

A. I stayed around there helping and trying to get the man out.

Q. Do you remember when somebody took the lady away?

A. The lady was laid on the bank.

Mr. Brumley: I don't think that that is relevant, your Honor.

The Court: Yes, we have had that.

Mr. Brumley: The death is admitted.

The Court: You concede that there was an accident?

Mr. Brumley: Yes, of course.

Q. Do you know who took her away?

Mr. Brumley: I object to that as immaterial.

The Court: Yes, sustained.

Q. During the time you were there did they move that train farther on down toward State Line?

A. They did.

Q. Out of sight?

A. That's right.

Q. And that was still while they were working around there?

A. Yes.

Mr. Allen: You may examine.

The Court: We shall adjourn until 2 o'clock.

[fol. 141]

Afternoon Session

2 P. M.

NEWALL COPELAND, resumed the stand and testified further as follows:

Direct examination (Continued).

By Mr. Allen:

Q. Doctor Copeland, you have selected from the various X-rays that were taken at the House of Mercy Hospital these six, I believe.

A. Yes, sir.

Q. Which will give you sufficient data to interpret what you found; is that right?

A. Yes, that is correct.

Mr. Allen: I offer them in evidence.

Mr. Brumley: Have you got the others?

The Court: We will get the others after they are marked, Mr. Brumley. I will read each one and give you the dates.

Q. In which order do they go, Doctor? You had better arrange them.

The Court: The first ones first and so on.

A. I think this one or these first because they represent the first pictures and then a couple of months later and so on.

The Court: It doesn't matter. Mr. Hexton will mark them.

(Marked Plaintiff's Exhibits 9 to 14 inclusive.)

Q. Doctor, will you take these X-rays, Exhibits 9 to 14 inclusive, and pick out the ones that you wish to speak

[fol. 142] of first, giving the number of the exhibit which you are interpreting?

A. Exhibits 11 and 12 first.

The Court: Take one at a time, Doctor.

The Witness: 11.

The Court: Take 11 and put it in the shadow box.

Q. Can you tell us when that X-ray was taken, Doctor?

A. On January 15th.

Q. 1941?

A. 1941. This represents—

Mr. Brumley: May I interrupt? May I ask whether that is the first in time?

The Court: Yes, is that the first in time, Doctor?

The Witness: I don't think so, your Honor. I kept this out to indicate the type of fracture.

The Court: It might be the first ones?

The Witness: It is not the first X-ray that was taken.

The Court: It is the one that indicates what you want to refer to?

The Witness: Correct.

Mr. Brumley: It is the first in time of these that are in evidence.

The Witness: Yes.

The Court: Yes, apparently.

Mr. Brumley: That is all I care about.

The Witness: It is chronological.

The Court: All right, Doctor.

Q. Put it in the shadow box, Doctor.

A. (The witness put the X-ray in the shadow box.)

Q. What view is that? What view?

A. This is the anteroposterior view from front to back.

[fol. 143] Q. Of what?

A. Of the right femur, the right thighbone.

Q. Will you describe what that shows?

A. This is the upper part of the shaft of the bone (indicating). This is the site of fracture (indicating). This is the flaring part that goes down where it widens out to form the knee joint (indicating). Here is the large upper fragment, the main shaft (indicating). Here is the fragment (indicating). This is a large fragment here, and this is the lower portion of the bone (indicating). There is a fracture through here and one large piece of bone com-

pletely missing (indicating). That came out through the wound and was gone (indicating). That is essentially the picture of that particular leg in that view when he came to the hospital (indicating).

Q. About what place on the leg is that fracture?

A. That extends from the middle third to the—through and down to the lower third.

Q. Can you illustrate about where?

A. From approximately this point here where that fragment comes, from here to here (indicating). That much of the thigh (indicating).

Q. About eight inches would you say?

A. About eight inches I should say.

Q. Is that what you call a compound comminuted fracture?

A. That is comminuted (indicating). What you see is comminuted (indicating). The compound part of it is in the skin. In other words the skin is opened and the fragments protrude to the other side (indicating).

Q. Now take the next picture, Doctor.

Mr. Brumley: What is that exhibit number, Doctor?

The Witness: Exhibit 11.

A. No. 12 is a picture of the opposite leg, the left leg (indicating).

[fol. 144] Q. And that was taken when, Doctor? Can you tell us?

A. January 6, 1941.

Q. Yes. That is the left leg?

A. This is the left femur thigh bone (indicating). This is where it articulates with the hip (indicating). This is the bump that you feel through your skin, and this is the site of fracture—a transverse complete fracture through the junction of the upper and middle third at approximately this point (indicating). That is also taken in the anteroposterior view.

Q. From front to back?

A. From front to back.

Q. As I look at that it seems as though one fragment is above the other.

A. This one is over-riding by the distance that you saw from here to here, approximately $2\frac{1}{2}$ inches (indicating).

Q. What are those white spaces I see down here (indicating)?

A. This (indicating)?

Q. Yes.

A. This was a temporary splint, metal band running up around here with a ring around here going all the way down to the foot (indicating). Those are buckles on the cotton straps, and this is the keeper of the buckle (indicating). They are metal things which just simply show in the plate as these are (indicating).

Q. Was that on the outside of the leg?

A. They were around the leg.

Q. They were around the leg in the case?

A. Yes.

Q. That is exhibit what?

A. Exhibit 12 (indicating).

Q. Now, will you take the next?

Mr. Brumley: When was that taken?

The Witness: Approximately the same time. I don't know as they were taken the same day. It is No. 9.

Q. Taken when, Doctor?

A. On March 10, 1941. A picture after operation, after bone reduction, cutting down, drawing the two fragments [fol. 145] which you saw in one of the other pictures apart so that they approximated this point and applying one of these stainless steel bone plates to the two portions of the bone so that they are approximated (indicating). This is the site of fracture here (indicating). This is the alignment and then these lines here are plaster of Paris cast inserted in the leg (indicating). That is also taken in approximately the same front to back view.

Q. What kind of plate do you call that?

A. Stainless steel vitallium, stainless steel Lane plate. Lane plate. It is simply the name of the man who designed it.

Q. Now will you take the next?

Mr. Brumley: That is of the left femur?

The Witness: That is correct.

A. I thought I had another one here of the right one at about the same time as that one is taken but I don't seem to find it. Shall I go on with the final pictures?

Q. Yes, these last two pictures (indicating).

A. Now Exhibit 13: This was taken on September 3, 1941 (indicating.) This is the picture of the previous one I saw with the metal plate in place (indicating). This overgrowth here is new bone formation in the manner in

which bone heals (indicating). This is the right femur (indicating). You can just see the lower part of it (indicating). You can also see at that point some of the callus or new bone formation that forms on bone (indicating). I have another picture of that final one here. No. 10 is a picture taken on September 3, 1941, of his right leg, the one which was compounded and comminuted (indicating). There are two views of this—in a lateral view through from side to side through the leg of the site of that fracture (indicating). This is the knee joint, this is the knee cap and this is the side bone (indicating). You see that there [fol. 146] is anterior bowing (indicating). There is a definition point at this place here which represents the place where the fragment was lost, but notice particularly the angulation forward so that his leg from here comes down and bends back above the point (indicating). That is the lateral view. Exhibit 14 is again the front to back view, anteroposterior view of the right femur (indicating).

Q. Is that taken on September 3rd also?

A. Taken September 3rd. This is the knee joint (indicating). There are the normal bony prominences at that point, and you see the original shafting of the bone coming down here (indicating). This is also new bone formation, this outline (indicating). This is new bone formation here (indicating). Here is the old line of fracture (indicating). This rarefied part you see is again the definition or form of a piece of bone coming out, and this irregular fragment is an infected piece of bone which we call a sequestrum and acts as a foreign body at the site of fracture (indicating).

Q. The picture on the right, No. 14?

A. This is the right leg (indicating). Both legs were taken on the same plate in the picture. This is the left thigh (indicating). Here you see the metal plate, .. you can see it, if you can see a notch in one of the screws so that you can see it here (indicating). This again is new bone formation, and the alignment of that is so (indicating). This one is somewhat different and of course in the lateral view it is very definitely different. There is an angulation.

Q. Doctor, you stated to the Court you had another picture taken about the time of the second sets of pictures of the right leg. Can you get that quickly?

A. I can go over that. I might find it.

The Court: That is an intermediary one, isn't it, Doctor?
That is in between.

[fol. 147] The Witness: That's right.

The Court: You have got the one at the beginning and you have got it later at the end.

The Witness: That is right.

The Court: That is not going to tell you very much.

The Witness: That is right, your Honor.

Mr. Allen: I think as long as he has it we ought to get it.

The Witness: Here is one picture, your Honor, of the hand.

The Court: They will have to be marked in evidence.

Mr. Allen: Here is the one of the hand. I will offer that in evidence.

Mr. Brumley: There is no objection.

(Marked Plaintiff's Exhibit 15.)

The Court: You cannot show any X-rays to the jury until they are marked in evidence, Doctor.

The Witness: There is one of the skull but I don't think it contributes anything to it.

The Court: Negative, is it?

The Witness: Negative.

The Court: You had better keep that out.

Q. Look at Exhibit 15.

A. Looking at Exhibit 15 it is an anteroposterior view of the back of the hand showing a fracture of the fifth metatarsal bone of the hand at this point with slight overriding and lateral turning out of the proximal fragment, that's all.

Q. That's all, Doctor. Now, will you take your seat?

Mr. Brumley: May I ask the date of that exhibit?

[fol. 148] The Court: Yes.

The Witness: December 30, 1940.

Q. Doctor, you have now given your interpretation of certain X-ray films taken at the hospital?

A. Yes.

Q. You mentioned in the course of your testimony that there were several operations performed.

A. Yes.

Q. Can you tell us approximately when the first one was, Doctor?

A. The operation on the left femur was on January the 14th. I believe that date is correct.

Q. If you want to refresh your recollection to be sure, why, I think his Honor will permit you to look at your hospital records.

A. January 14, 1941.

Q. What did that operation consist of, Doctor?

A. It consisted of the open reduction.

Q. What does that mean? What is "open reduction"?

A. It means cutting down on the bone, an incision through the lateral aspect of the side down to the bone, placing the fractured ends in alignment and normal position and applying first an internal splint and metallic plate to hold them in place.

Q. And at that time was any taking out of bone done?

A. Treatment of the other leg, the right side, consisted of wide-open removal of damaged, injured, tissue, muscle tissue, small fragments of bone and the alignment of these fragments as well as it was possible to retain them in position at the time. The wound was packed open and a splint was applied. A plaster cast was applied over both legs up to the waist and down to the toes on both sides.

Q. As to that plate that you referred to and which I think you called a "Lane plate", how was that held in place?

A. With screws.

Q. Through the bone or around the bone?

A. They come in various sizes, but this one is an eight opening plate with through screws which go through the [fol. 149] plate all the way along and screwed right through the bone, from one cortex of the bone to the other side, through the marrow chamber and over to the other side.

Q. After this operation on January 14, 1941, what was the condition of his legs? How did they respond to your treatment?

A. Healing was quite satisfactory on the left side. On this side we had a sterile field to operate on. We could properly prepare the skin and so no infection took place. Healing was prompt and satisfactory. On the opposite side—

Q. What about the right side?

A. On the right side there was infection, of course, to begin with. You presuppose infection in all compound fractures, and there was infection from the very beginning.

It drained for a long time. It was still draining when I last saw the patient through a small opening. Bone formation began to take place in the normal course of events, and, however, as time went on this small fragment, this sequestrum of bone, which is an infected piece, separated off and is still acting as a foreign body and is still causing discharge.

Q. Did you have to take him to the operating room subsequent to that operation on January 14th?

A. Yes, on three different occasions.

Q. Can you give us approximately the dates? Refresh your recollection from the hospital records, Doctor.

A. We manipulated him—well, on one occasion subsequent to the operation, of which we just spoke, the cast was removed. The operative incision on the left side—the dressing was removed, and this was practically healed at the end of six weeks or thereabouts,—the incision, the skin incision. On the opposite side there was a great deal of discharge from it in the nature of pus and on both sides incomplete healing at that time. The cast was again—the original cast was removed and replaced by another, a lighter one, and later, on April 17th, on April [fol. 150] 28th, on May 16th under sodium pentathol anesthesia I attempted manipulation of both knee joints, which were quite stiff when the cast was removed.

Q. With what results, Doctor?

A. At the time of the first manipulation very poor on both sides. The second time on the second date a little more improvement on the left side, none on the right; and subsequent to that on the third manipulation perhaps a little further advantage on the left side with very little improvement on the right side. The knee joints due to inflammation, due to inactivity over a long period of time, were pretty well frozen.

Q. Pretty well what?

A. Frozen, fixed so that they would not move.

Q. When did he leave the hospital, Doctor, do you recall?

A. Just before Memorial Day. The exact date was May 27, 1941.

Q. At that time when he left the hospital, May 27th, what was then your diagnosis of injuries to this man? He had what?

A. You want all the diagnosis?

Q. Yes. He had had what to his head first?

A. Well, he had a very severe concussion. I don't know whether you are allowed to enter probabilities or not, but the possibility of a sub-dural hemorrhage into the brain—

Mr. Brumley: I object to that.

The Court: No. Strike that out.

A. (Continuing.) All right, very severe concussion.

Mr. Brumley: I move to strike it out.

The Court: Yes, it is stricken out.

Q. Concussion of what?

A. Concussion of the brain.

Q. And what else?

A. A laceration of the face and scalp.

[fol. 151] Q. And these fractures that you have described?

A. Fracture of the left fifth metatarsal bone, fracture of the left femur and compound comminuted fracture of the right femur.

Q. What evidence had you had of this concussion to the brain? What were the symptoms that indicated to you concussion of the brain, Doctor?

A. The very profound shock when he came to the hospital, the unconsciousness, weakened pulse, weakened respirations and general coma.

Q. Did you see him after he left the hospital, Doctor, on May 27, 1941?

A. Yes.

Q. When was it you saw him again, do you recall?

A. Close in mid-summer. I have no record of that date because I saw him at the hotel on his way up to his summer place.

Q. At Cooperstown?

A. Yes.

Q. And do you recall what you found as to the conditions at that time?

A. He was limping and had rather marked shortening of the right leg, and this anterior bone which apparently shows in the X-ray, and there was still discharge from a sinus of the right leg extending down to the bone and from which pus was draining.

Q. Did you recommend anything for him to do during the summer?

A. Yes, I recommended that he walk a little, go in swimming if he could and generally try to improve the motions of his legs.

Q. Did you see him again in the fall?

A. I saw him again on September 4th, I believe. September 3rd.

Q. Where did you see him then?

A. At the House of Mercy Hospital.

Q. Did you make an examination of him at that time?

A. Yes, I did.

Q. Will you state what you found at that time regarding his injuries and other conditions?

A. As regards?

[fol. 152] Q. The injuries and the condition that you found.

A. He was walking with a cane. He has a considerable limp with obvious shortening of the right leg. Examination of the right leg at the site of injury and the area through which the original opening was made was still draining pus from this small sinus in considerable quantity. There was marked thickening of the bone at this point, from tenderness on pressure and general scaliness and some pimping of the skin in that region.

Q. What did that indicate?

A. The pimples and so on?

Q. Yes.

A. Oh, impaired circulation, inactivity.

Q. How about the motion?

A. The motion was poor. He has a very small amount of motion of the left knee joint, I should say, through a 5 degree angle. It is almost fixed.

Mr. Brumley: In which knee joint?

The Witness: The right.

Q. Did you say "left"?

A. I am sorry. I meant right. It is hard to keep all that in mind, switching back and forth.

Q. How about the motion in the left leg?

A. In the left leg the upper scar was thoroughly healed. You can feel still some extending along the bone formation at the site of fracture and motion at the knee joint had improved since I had seen him before, so that it was bending or he was bending it through—he could bend it to almost a right angle, not quite.

Q. At that time did you perform any further operation on him?

A. No.

Q. In your opinion is a further operation necessary?

A. Further surgery will unquestionably be necessary.

Q. Why didn't you do it at that time, Doctor?

A. Why didn't I?

[fol. 153] Q. Why?

A. Oh, he was planning to return to college this fall in September, and because of what this boy had been through and his present—I mean his mental state—the emotional disturbance and so on, I felt that it would be much better for him altogether if he were to return to school and get himself occupied and keep him very busy and so on. I felt, further, that it would not—that being nearby where I could get in touch with him that we could watch him for any change which might take place which might necessitate further surgery before he got through next spring. It was felt that his condition would not be damaged at all by waiting for some time to do whatever else is necessary later.

Q. You have not examined him since you have been here in the city, have you?

A. No. I have talked with him, just seen him here today and Monday.

Q. Do you know whether or not there is an opening still on his right leg and still discharging?

A. Oh yes, sir, my, that is still draining.

Q. As to this operation that you feel will be necessary, what is that operation and what is it for?

A. It will necessitate the opening up of the diseased area in the right thigh and the removal of this fragment, this sequestrum, of infected bone. That condition represents what we speak of as osteomyelitis, an infection of the bone, and is most commonly in chronic state which is resistant to treatment.

Mr. Allen: Will you concede without a hypothetical question that the collision was the competent producing cause for the conditions which the doctor described?

Mr. Brumley: Yes.

Q. Doctor, the conditions which you described as having been found as recently as September 3rd and which you [fol. 154] understand to be that the wound is still open and

that a further operation is necessary—can you give what your prognosis is as to his condition?

The Court: I think you would have to separate it. Just take the left leg, Doctor. What is your view as to that?

Q. Yes, what is the future as to his left leg?

A. In regard to the left leg he has normal length. He has improving motion at the knee joint. It may or may not fully be restored to—

The Court: Doctor, you have got to be very definite about this. If you don't know just say so. Is it going to be fully 100 per cent say so or if it is not how much. If you cannot say so you must say that you cannot say so.

Q. In your opinion with reasonable certainty, Doctor—

The Court: I mean with reasonable certainty.

A. In my opinion he will have some limitation of motion in the left knee joint.

The Court: How much, Doctor?

The Witness: Again I can only speak with—

Mr. Allen: Reasonable certainty.

The Witness: With reference to reasonable certainty.

The Court: That is all you are asked to do.

Q. With reasonable certainty in your opinion, Doctor.

A. He will be able to bend it to an angle of—

[fol. 155] The Court: Do you mean slight or great, Doctor? Will the motion be limited to a slight degree?

The Witness: To a slight degree.

The Court: You cannot judge it in percentage, can you?

The Witness: No.

The Court: He has got a plate up there; hasn't he?

The Witness: Yes. That is there for all time unless you operate and take it out.

The Court: That is there for all time unless you operate and take it out?

The Witness: That is right.

The Court: But if you don't operate and take it out that will be there for all time.

The Witness: That is right unless some—

The Court: Never mind now. I know what you are going to say, but you cannot say it definitely, can you?

The Witness: No.

The Court: It may stay that way and never bother him; is that right?

The Witness: Yes. That's correct.

The Court: Now take the right one.

The Witness: The right knee I feel will not improve any more than it has at the present time.

The Court: How much loss of motion has he got at the present time?

The Witness: 95 per cent.

The Court: Go ahead.

The Witness: He also has shortening of this leg.

The Court: How much?

The Witness: A matter of an inch and a half to two inches, because of mushrooming of the bone and because of anterior bowing.

[fol. 156] The Court: Will that ever get any better?

The Witness: No.

The Court: Proceed.

The Witness: He has infection which constitutes chronic osteomyelitis.

The Court: Will an operation cure that?

The Witness: An operation? That is a little hard to answer, your Honor. I mean you can't—

The Court: That is the way it must be done, sir. If you cannot answer it you are always allowed to say you cannot answer.

The Witness: I would say it won't be cured; he will always have some discharge; he will always have some trouble with his leg; he will always have some pain.

The Court: That is the diseased bone, isn't it?

The Witness: Right.

The Court: If you cut away the diseased bone.

The Witness: You can't cut away all the diseased bone.

The Court: You don't know that until you get in there, do you, Doctor?

The Witness: Well, only from past experience and from a study of literature on it, it is resistant to cure.

The Court: Your opinion is, speaking with reasonable certainty, that it cannot be done; is that right?

The Witness: Right.

The Court: But you have seen cases where it has been done.

The Witness: Right.

The Court: His age is in his favor, isn't it, Doctor?

The Witness: Yes.

[fol. 157] Q. Is there anything else regarding the right leg, Doctor?

A. He will have permanent shortening; he will have a permanent limp; he will have permanent deformity.

The Court: And the scar will be permanent?

The Witness: Scars, shortening, limitation of motion and scar will be permanent.

Q. As to this injury to the left hand or the right hand.

A. Yes.

Q. What is the condition of that, Doctor?

A. Good functioning. His left hand won't bother him to any great extent.

Mr. Brumley: I didn't get that last.

Mr. Allen: "His left hand won't bother him to any great extent."

A. (Continuing.) He has a slight swelling deformity but that is all.

Q. Doctor, can you state what is the reasonable charge for your services that you rendered to Mr. Hoffman?

A. I have rendered a bill in the case.

Q. And how much was it?

A. \$1590.

Q. Is that a reasonable charge for the services which you have rendered?

A. I believe so.

The Court: What is your hospital bill?

Mr. Allen: I have got it here.

The Court: Show it to Mr. Brumley; maybe he will agree to it.

Mr. Allen: Pardon me a moment, your Honor.

Mr. Brumley: May I ask just one question of the doctor?

The Court: Surely.

Mr. Brumley: You have looked at it.

Mr. Allen: No, I have not.

[fol. 158] Mr. Brumley: If the doctor says that is reasonable I mean that is all I want.

Q. Doctor, as to these bills from the Mercy Hospital of Pittsfield, you are familiar with the bills of that hospital, are you?

A. I know their weekly rates for such a room as Howard had.

The Court: Look at these bills quickly, will you?

The Witness: Yes.

The Court: Those are the hospital charges that the plaintiff had.

Mr. Allen: I might say that I have taken from the bills such things as telephone calls made by the mother and father, which makes a total of \$1404.30.

The Court: Subject to correction?

Mr. Allen: Subject to correction.

The Court: Mr. Brumley will stipulate subject to correction.

Mr. Allen: Subject to correction.

Mr. Brumley: Yes.

(Marked Plaintiff's Exhibit 16.)

Q. Doctor, what are the rates for nurses up there in Pittsfield? Is \$25 a week a normal charge?

A. Yes, on such cases as this one.

Q. And then there is a certain board for them which is on the hospital bill; is that right?

A. That is on the hospital bill.

Q. Do you remember who the nurses were in Mr. Hoffman's case?

A. There was a Miss Coleen.

The Court: I am sure that is all right.

Mr. Allen: Yes.

[fol. 159] Q. In this hospital; is that right?

A. That's right.

Q: I have here twenty-two weeks for Miss Coleen at \$35 which makes \$770, and Miss Helman for thirteen weeks at \$35 a week, \$455.

The Court: \$1225.

Mr. Allen: You may examine, Mr. Brumley.

Cross-examination.

By Mr. Brumley:

Q. Doctor, you had another X-ray, I take it, of the left hand later than Exhibit 15, which was taken December 30th; is that so?

A. I don't think so, sir. There may have been one. I think there was only one X-ray taken of that hand; I don't recall.

Q. In any event—

A. I could refer to the X-ray record of the X-ray reports and I could find out for you.

Q. In any event that fracture of the fifth metatarsal bone is united?

A. Yes.

Q. And you say now I think that the left hand won't bother him to any useful extent.

A. I don't believe it will.

Q. The first set of X-rays that you referred to, Exhibits 11 and 12, were taken on January 6, 1941.

A. Yes.

Q. Then you refer to Exhibit 9 of the left femur, March 10, 1941, and that showed a stainless steel Lane, isn't it, plate?

A. That's correct.

Q. Is that the usual type of plate for that kind of case?

A. Yes.

Q. Is there any other metal used these days besides steel?

A. Ordinarily we use vitallium stainless steel plates.

Q. But there is another metal, is there not, Doctor, used under such circumstances which would be less likely to cause disturbances or trouble?

A. That would be likely to?

Q. A metal that would be less likely to.

A. Less likely?

[fol. 160] Q. Yes.

A. No. That is why we use vitallium stainless steel.

Q. You think that is the best metal for that kind of treatment?

A. Yes, it is substantially non-corrosive and non—resists chemical action.

Q. Your Exhibit 13 taken on September 3, 1941, of the right knee showed a callous formation there, didn't it?

A. Yes.

Q. And that could be described as nature's remedy—the formation of callus?

A. It is nature's way of healing bone.

Q. Can you tell us in a little more plain language what is meant by "callous formation" that you observed on September 3, 1941?

A. I don't quite understand.

Q. Is it a bony growth?

A. It terminates as bone. It begins as a normal physiological process that starts with blood vessels being poured out at the site of fracture, which later undergoes certain healing changes.

The Court: Yes, but Doctor, he wants you to tell us and we want you to tell us in language that we can understand.

The Witness: Well, changes form.

The Court: What is callus? Tell the jury.

The Witness: Changes from a type of sticky glue to a stage of bristle, if you want, or soft cartilaginous tissue into hard bone eventually.

The Court: The bone throws it out where it is fractured and you find that about the bones when the bones are in line together; is that right?

The Witness: Yes.

The Court: And this sticky substance is thrown out and that tends to hold that bone in place together, and then later that becomes hard bone, and if you have got good position that bone is just as good as though the bone had never been fractured at that place.

[fol. 161] The Witness: That is right.

The Court: As though it was never fractured?

The Witness: That is right. Not as good but almost as good.

The Court: For all practical purposes, Doctor?

The Witness: Yes.

The Court: That bone becomes as good as the original bone; is that right?

The Witness: That's right.

Q. In this X-ray plate of 9/3/41 you found that there had been new bone formation both in the right femur at the site of the fracture and in the left femur.

A. Yes.

Q. You found that the X-ray of the skull was negative?

A. Yes.

Q. When you attempted manipulation of both knee joints on April 17th and April 28th and May 16th your first attempt was not very successful, was it?

A. That's correct.

Q. And then I think you said in answer to one of Mr.

Allen's questions that as to the left knee joint it was better eleven days later—that is, on April 28th.

A. It was improving.

Q. It was improving?

A. Yes. We were able incidentally to use a little more manipulative pressure on bending the left knee than we were the right, because the left knee was fixed with this plate and the right one was not.

Q. And then on May 16th the left knee joint was still further improved, wasn't it?

A. That's correct.

Q. As a matter of fact so far as the left knee joint is concerned is there now any limitation of movement?

A. The left one?

Q. Yes.

A. Yes.

Q. To what extent?

A. Well, he can bend it. When I saw him he could bend it to a point just short of a right angle.

[fol. 162] Q. Will you illustrate?

A. That (indicating). That angle (indicating).

The Court: How far should he be able to do that?

The Witness: Away back here (indicating).

Q. And how far can he extend it?

A. Straight.

Q. Straight out?

A. Not 180 degrees, a straight line.

Q. Then he has a movement there of 90 degrees; is that it?

A. Not quite 90 degrees.

Q. What in the normal leg is the total number of degrees?

A. Through which he could place it?

Q. Yes.

A. I should say about 135.

Q. When you last saw him had the flexion of the left knee improved since May 16th?

A. No.

Q. When you last saw him did he try to flex his left knee?

A. I didn't make any attempt to manipulate it.

Q. Yes.

A. I tried to bend it through whatever range of motion it would go, which was very little.

Q. I am talking about the left knee.

A. Oh, I am sorry.

Q. I am talking about the left knee.

A. I am sorry.

Q. Let me repeat then; when you last saw him or made an examination of the left knee had the flexion improved since May 16th?

A. Yes, sir.

Q. And wouldn't you with a reasonable degree of certainty expect continued improvement in flexion?

A. Yes.

Q. And would you with a reasonable degree of certainty expect that he will have full flexion in the left knee?

A. No.

Q. Would you expect that he would have for practical use—I will put it this way—full use of the left knee for practical purposes?

A. That all depends on what you define as practical purposes.

Q. I mean for walking for instance, for getting up [fol. 163] and sitting down. I am still talking about the left knee.

A. Well, he needs only 90 degrees angulation of the knee to sit down; as far as that is concerned, yes.

Q. He needs how much for walking?

A. Less than that normally.

Q. So for getting up and sitting down and for walking his left knee has sufficient flexion?

A. Yes. Not for climbing though.

Q. How much flexion do you need for climbing?

A. It depends on how high you have got to step.

Q. But there will be continued improvement of flexion in the left knee in your opinion?

A. Yes.

Q. He is able to support his weight on his left leg, isn't he?

A. Yes.

Q. And this last summer he walked some and did some swimming to improve the motion of both legs?

A. Yes.

Q. And did that exercise improve the motion of both legs?

A. I am afraid he didn't do too much of it from what he tells me. He was not able to.

Q. But that was your prescription?

A. Yes.

Q. In the left leg the scar is healed, the callus formed, there is good bony union—all that is true, isn't it?

A. Yes.

Q. And there is normal length to the left leg?

A. Yes.

Q. In the right leg there is a 1½ to 2 inch shortening, Doctor.

A. I would say that was about the extent.

Q. You haven't measured it.

A. I haven't seen him since September.

Q. That is due to this angulation?

A. Angulation as well as mushrooming of the fractured site.

Q. Has the fracture knitted?

A. (There was no answer.)

Q. Don't you want to answer? I mean is that a bad question?

A. Well, no. It is simply a matter of terminology. It has not knitted or not completely healed.

Q. Let me put it this way: has the fracture line united?

A. I would say yes to that. Yes.

[fol. 164] Q. That through the process of callous formation?

A. Yes.

Q. Have you got the hospital record there, Doctor?

A. Yes.

Q. May I see it please?

A. Yes (handing to Mr. Brumley).

Q. You made some reference to scars on the face and scalp.

A. Yes.

Q. They have all healed?

Mr. Allen: "Scars" do you mean?

Q. I mean the wounds.

A. Wounds have healed.

Q. And they are hardly visible today, are they?

A. I would say that they are definitely visible.

Q. You can see them today?

A. Yes. They are on the exposed portion of his face, and prominent.

Q. The muscular power in the left leg is good, is it not, Doctor?

A. I would say it was good considering the present status of healing.

Q. The left knee is normal?

A. No.

Q. In contour?

A. Yes.

Q. Is the left knee jerk normal?

A. No.

Q. Have you tried that lately?

A. Not recently.

Q. When was the last time?

A. When he left the hospital.

Q. That was May 27th?

A. That's right.

Q. Or 28th?

A. But any limitation of motion will inhibit or impair the normal knee jerks.

Q. This operation that you mentioned as being probably advisable in your opinion at a time in the future of the right leg is for the removal of a piece of bone that has been infected?

A. Yes.

Q. Or a piece of infected bone?

A. A piece of infected bone.

Q. And that is in the right femur?

A. Yes.

[fol. 165] Q. And that operation is very commonly done by surgeons?

A. Yes. It is not uncommon I mean.

Q. And how long would you estimate that the patient in this case will be in the hospital for that operation?

A. I am sorry, I cannot answer that accurately.

Q. Could you give us an approximate period of time?

A. Well, again, it all depends on whether the infection was cleared up by the removal or whether it was not cleared up.

Q. It is possible, is it not, Doctor, that the renewal of that bone would clear up the infection?

A. It is possible.

Q. That is the reason for the operation, isn't it?

A. Right.

Q. What compensation is made for the shortening in the right leg? Can you tell us what the compensation is? Is there something in his shoes that you have advised him to wear?

A. His shoe is built up a little. There was a lift put in one of his heels. That was recommended. I believe he is wearing it.

Q. You have seen him how many times to examine him since he left the hospital?

A. Twice I believe.

Q. Once in the middle of the summer?

A. Yes.

Q. And once when?

A. The first week in September.

Q. The first week in September?

A. Yes.

Q. When he left the hospital you gave him no medicine of any kind, did you, to take with him?

A. I don't recall that he was—we had him on some vitamin tables and some yeast tablets for a time. I don't just recall whether he is taking them now or not.

The Court: Everybody takes them now.

The Witness: Yes, I guess they do.

Mr. Brumley: That is all.

The Witness: Yes. I don't recall that he was getting any other medication, I would say.

[fol. 166] Q. Even while he was in the hospital—for instance, between January 6th and January 13th—his general physical condition improved, did it not?

A. Yes, each day showed some improvement.

Q. And during that time his pulse was fairly good?

A. Yes, sir.

Q. And then from January 15th to January 31st his general condition continued to improve, did it not?

A. That's right.

Q. And that improvement continued from February 1st to February 9th? I am talking about his general condition.

A. Well, he improved. If I recall his blood count went down some. That is natural in hospitalization in infections, but we made an attempt to treat that.

Q. There were some X-rays taken on February 24, weren't there, Doctor?

A. I can't recall the dates. There were many of them taken to show the various stages.

Q. I mean around February 24th X-rays showed that both legs were in excellent position? X-rays of both legs showed the fragments were in excellent position with good callous formation?

A. If that is in the X-ray report that is correct.

Q. I am not trying to say.

A. Well, I don't—I mean I can't recall dates. Yes, I would say that that was so.

Q. Around that time?

A. Yes.

Q. On March 10th wouldn't you say that the X-rays taken on that day of both femurs showed the fractures were in good alignment with heavy callous formation?

A. Well, without referring to the hospital notes I would say that was so.

Q. You refer to them, Doctor, and see whether that is not true (handing). I am talking about March 10th. I am referring to X-rays of both femurs—that is, the right and left?

A. March 10th, yes.

Q. Both femurs showed fractures in good alignment with heavy callous formation; is that right?

A. Yes.

[fol. 167] Q. On March 28th there was a repeat X-ray of the right leg and that X-ray showed fragments in good position with good callous formation.

A. Yes.

Q. Right?

A. Yes.

Q. On March 29th the patient was up in a wheelchair.

A. I don't know. I shall have to refer again to notes here.

Q. Let us check that date, if you will—March 29th up in a wheelchair; is that right?

A. That's right.

Q. Then by May 3rd—from May 3rd to May 15th there was gradual improvement and increased strength and the patient's condition was much better.

A. Yes.

Q. And on May 27th he was discharged as improved.

A. That's right.

Q. And from May 17th to May 27th there was continual gradual improvement in his condition.

A. That's right.

Mr. Brumley: I don't want to take the time of your Honor to go through the hospital records for further cross-examination. I am satisfied to end here but may I have the privilege of looking at the hospital records later?

Mr. Allen: Surely.

Mr. Brumley: This is part of it. It slipped out.

The hospital record is here in court. Do you want it kept here?

Mr. Brumley: Yes. I should like to.

The Court: Give it to the clerk.

The Witness: Will this be returned? I brought this down. I just want assurance that it will be returned, because they are permanent records of the hospital, X-rays and all.

The Court: Mr. Allen will see that they are returned intact and if he does not return them you complain to me, because he comes here and tries cases pretty often and I [fol. 168] don't think he would care to slip up on it.

The Witness: I must insist on it.

The Court: That is the only hold I have on him but I think he will see to it that they are returned.

Mr. Allen: Surely.

Mr. Brumley: I have just one or two more questions, your Honor.

Q. There was no lumbar puncture performed, no lumbar spinal performed.

A. No.

The Court: There was no fracture of the skull.

The Witness: No. This boy was much too seriously injured—

The Court: No. Maybe you were led astray. I said he said there was possible fracture of the skull. My notes show that he said possible fracture of the skull and then it changed to a very severe concussion of the brain.

The Witness: I said severe concussion of the brain.

The Court: Your X-rays showed that it was possible fracture.

The Witness: X-rays taken at the bedside are not so satisfactory.

The Court: You used to decide fractured skulls without X-rays years ago.

The Witness: Yes.

The Court: And now when X-rays are taken—

The Witness: We make more mistakes trying to find them.

Mr. Brumley: That is all.

Mr. Allen: That is all, Doctor.

[fol. 169] ARTHUR PAUL BONA, resumed the stand and testified further as follows:

Cross-examination.

By Mr. Brumley:

Q. How long were you there before they moved the train farther down?

A. Well, I came back after I had gone down to get the sheriff, and during my absence the train was moved.

Q. Then you came back—withdrawn. What time did you get back or get there for the second time?

A. Oh, about ten or fifteen minutes. Ten minutes I should say.

Q. And how far had the train been moved toward State Line?

A. Out of sight.

Q. Are you sure about that?

A. Yes.

Q. When you got near the crossing in the town—what Mr. Allen and I have been calling the “town crossing”, you came to a stop, didn’t you?

A. Yes.

Q. Why did you stop?

A. The train tracks run parallel with the road right there and we stopped because I happened to see the train coming. That was a short ways before the crossing.

Q. How far was the train away when you first saw it?

A. Well, it was parallel with us, oh, I should say.

Q. How far from the crossing was it?

A. Oh, about 150 feet.

Q. How long did you stop there?

A. Until the train went by.

Q. Besides seeing the train did you hear the train whistle for that crossing?

A. I did not.

Q. Are you sure about that?

A. Positive.

Q. Did Mr. Helfrich see you after this accident?

A. That is the railroad investigator?

Q. Yes.

A. Yes.

Q. That was at the public market in West Stockbridge that he saw you; is that right?

A. That is right.

[fol. 170] Q. Do you remember when it was?

A. During the summer.

Q. And did he have a stenographer with him at that time?

A. He did.

Q. Was anybody else present when he talked to you?

A. Mr. Fowlen, my employer.

Q. Who was he?

A. Mr. Fowlen.

Q. Did Mr. Helfrich ask you several questions and did you make answers?

A. Yes, he asked me some questions.

Q. Did he ask you this question and did you make this answer:

"Q. How long did you stop there—I am referring now to the—I will go back again.

"Q. Did you stop near the main crossing in West Stockbridge near Troy's Garage?

A. Yes, this one here, the first one."

Q. Do you remember that question and that answer?

A. I didn't get that last part of what I said.

Q. I will give you the whole thing: "Q. And did you stop near the main crossing in West Stockbridge near Troy's garage? A. Yes, this one here, the first one."

A. Meaning the railroad crossing?

Q. Yes.

A. Yes, I think I said that to him.

Q. Were you asked this question and did you make this

answer: "Q. How long did you stop there? A. Until the train went by."

A. I think I did.

"Q. Did you wait for the train to go by? A. Yes."

A. I imagine I did, yes.

Q. That is true anyway, isn't it?

A. Yes.

Mr. Allen: That is not what he said here, I think, your Honor.

The Court: Yes, but he is leading up to it.

Mr. Brumley: I am leading up to it:

"Q. And did you hear the train whistle for the crossing? A. Yes."

A. I didn't say that.

[fol. 171] Q. You didn't say that?

A. No.

"Q. It did whistle for the first crossing. A. Yes."

A. I didn't say that.

Q. Were you asked this question and did you make this answer: "Q. You are sure about that? A. Yes."

A. I didn't say that.

Q. Were you asked this question and did you make this answer: "Q. You do remember how it whistled? A. I don't remember."

A. I didn't say that.

Q. "Q. Whether it was long whistles or short whistles. A. I know I heard it."

A. I didn't say that.

Q. Are you sure about that, are you?

A. Yes.

Q. And you say now that you didn't hear the whistle for that crossing?

A. That's right.

Q. How was the train made up as it passed you at the town crossing or the first crossing?

A. A tender, a locomotive and the caboose.

Q. The tender was first, was it?

A. That's right.

Q. And then the locomotive?

A. Yes.

Q. And do you remember which way the locomotive was headed?

A. I do not.

Q. And the caboose was third, was it, in line?

A. Last, yes.

Q. So the engine was in between the tender and the caboose.

A. Yes, sir.

Q. Were you looking at that train as it went by?

A. Yes.

Q. Did you see any light on it?

A. The only light I have seen on that train was after it went by--the two lanterns in the back.

Mr. Allen: The two lanterns in the back, did you say?

The Witness: Yes.

Q. Where were they?

A. On the caboose.

Q. Were you looking at the train all the time that it came [fol. 172] down from the railroad station to the crossing?

A. No, I was not.

Q. When did you look at the train, when it had passed you?

A. When it had reached up to us.

Q. Did you look at the train as the tender went over the crossing?

A. Yes.

Q. Did you see any light on the tender?

A. I did not.

Q. Did you see any light on the engine?

A. No.

Q. You say there was no light on the tender?

A. No.

Q. You don't know?

A. There was no light on the tender. There wasn't any light on the tender.

Q. Are you sure about that?

A. Yes.

Q. There was no light on the engine?

A. There was not.

Q. As it went over that crossing in the village of West Stockbridge?

A. Yes.

Q. How fast was it going at that time?

A. I couldn't say. Average speed, I should say.

Q. What would you say is average?

A. Well, the average speed of a freight, I should say.

Q. Fifteen to twenty miles an hour?

A. Perhaps.

Q. Was it a clear night?

A. I didn't notice.

Q. Did you hear the rattle of the train?

A. Yes.

Q. Before it got to the crossing?

A. Yes.

Q. How far away could you hear that?

A. Well, I didn't look down to see how far away the train was.

Q. Could you hear the pumping of the engine before it got to the crossing?

A. Yes.

Q. How many seconds before it crossed over the crossing could you hear it?

A. A couple of—two or three seconds I should say.

Q. You were sitting in the front seat with your brother, were you?

A. Yes.

Q. To his right?

A. Yes.

Q. How many times have you been down to New York [fol. 173] to see Mr. Diamond about this case?

A. This is my first time.

Q. When did you come?

A. Yesterday.

Q. You gave a signed statement to Mr. Diamond.

A. Yes.

Q. When did you give him that?

A. I believe it was in March.

Q. That was given in West Stockbridge?

A. Yes.

Q. Did you see him after that?

A. Yes.

Q. When?

A. Oh, I should say a month or so afterward. I couldn't tell you the exact date.

Q. Did you see him again?

A. Yes.

Q. When?

A. After that sometime. I couldn't tell you the exact date.

Q. In West Stockbridge?

A. Yes.

Q. How many times have you seen him?

A. Oh, about three or four.

Q. Always in West Stockbridge?

A. Yes.

Q. You gave him one statement?

A. Yes.

Q. Not more than one?

A. No.

Q. Going up to the top of the grade about a point about opposite the Catholic church was that where the rear end broke down?

A. About there, yes.

Q. How far is that from the crossing?

A. Some place between four and five hundred feet. I should say.

Q. And did you open your door?

A. Yes.

Q. Had the window alongside you been closed up to that time?

A. I couldn't say.

Q. Do you know whether the window alongside the driver's seat had been closed up to that time?

A. I don't remember.

Q. You opened the door on your side, did you?

A. Yes.

Q. And your brother opened the door on his side?

A. Yes.

Q. And you continued to keep that door open until you got over the railroad crossing.

A. Yes, sir.

[fol. 174] Q. And you looked back, did you?

A. Yes.

Q. Did you look forward at all towards the crossing?

A. Not very much. Once in a while.

Q. Did you at all?

A. What was that?

Q. Did you at all?

A. Yes. I did.

Q. Did you see any car coming towards the crossing?

A. No.

Q. Did you hear any crash?

A. Yes.

Q. Where were you when you heard the crash?

A. Oh, about at the top of the hill or in around there someplace.

Q. Up at the top of the hill?

A. That's right, before you start going down.

Q. Were you paying any attention to a train whistle?

A. I was aware of it, yes.

Q. You were aware of it?

A. Aware of it, yes.

Q. What do you mean, you were "aware of it"?

A. Well, it passed us at the first crossing. We had our ears open for the train.

Q. I am talking about the second crossing now.

A. Yes, I know that.

Q. Were you paying any attention to a possible train whistle?

A. Yes.

Q. You were looking back, weren't you, most of the time?

A. I was.

Q. And this rear end made some noise going down hill, didn't it?

A. Yes.

Q. In a statement to Mr. Helfrich referring to the train whistle were you asked this question?

Mr. Allen: One moment. I object to the form of that question, your Honor.

Mr. Brumley: I withdraw that.

Q. When Mr. Helfrich saw you did he ask you this question and did you make this answer: "Q. Were you listening for it—that is, referring to the train whistle?"

A. I was not paying much attention to it because I was not driving. You can ask my brother and perhaps he can give you further details."

A. I don't remember that.

Q. Will you say that you didn't say that?

A. Yes.

Q. You didn't say that?

A. I didn't say that.

Q. At the time Mr. Helfrich called on you were you asked this question and did you make this answer: "Q. Did you hear the crash between the train and the car? A. No, I didn't."

A. I didn't give him any statement like that.

Q. You didn't?

A. No.

Q. "Q. You are sure you didn't hear the noise of the crash? A. No, I heard the train go by."

A. I don't think I answered that question either.

Q. Were you asked this question and did you make this answer: "Q. And you don't remember hearing any crash or any unusual noise on that crossing? A. No, not unusual."

A. I didn't make that statement.

Q. Do you remember that you were asked that question?

A. No.

Q. You didn't make that answer?

A. No.

Q. "Q. Or any unusual noise on the crossing? A. We heard the train. We were expecting it, but I was not expecting that whistle and I didn't hear it."

A. What was that question? I didn't get it.

Q. Were you asked this question and did you make this answer: "Q. Or any unusual noise on the crossing? A. We heard the train. We were expecting it, but I was not expecting that whistle and I didn't hear it."

A. No.

Q. You didn't make that answer?

A. I didn't.

Q. Were you asked this question and did you make this answer: "Q. But you didn't hear the crash between the car and the train? A. What let us know that the train was nearby was a light." Did you make that answer?

A. No.

[fol. 176] Q. Were you asked this question and did you make this answer: "Q. A light? A. Yes, some kind of light shining from the train. That is how we knew it."

A. I didn't make that answer.

Q. Did you see any light on the train as you approached the crossing at the place of the accident?

A. No, not as it approached.

Q. Did you see the train at all before the accident, going over that crossing?

A. No.

Q. Did you see Mr. Hoffman's automobile at any time coming towards the crossing?

A. No.

Q. In answer to one of Allen's questions I think you said your sister called out, "Look out, there is a train coming;" is that right?

A. Yes.

Q. Where was your car at that time?

A. We were descending the hill.

Q. That is, between the church?

A. The church and the crossing.

Q. And the crossing. Did you look up to see whether there was a train coming?

A. Yes.

Q. It was a train coming?

A. It was already past the crossing.

The Court: That would be after the accident, wouldn't it?

The Witness: Yes, that is right.

The Court: When your sister said, "Look out, there is a train coming"?

The Witness: Yes.

The Court: Then by the time you looked up the thing had already happened.

The Witness: You see, Judge—

Mr. Brumley: No, don't. Get yourself oriented. Look at the Court and me.

The Court: That is all right, I am not trying to trip you [fol. 177] or anything. I am trying to get your thoughts down all right. You say your sister said, "Look out, there is a train coming"?

The Witness: Yes.

The Court: And then by the time you looked up the train had passed the crossing.

The Witness: Yes.

The Court: What part of the train did you see pass the crossing?

The Witness: The caboose car.

The Court: Just what part?

The Witness: The end.

The Court: What part of the end?

The Witness: Well, the tail part, if you want to call it that.

The Court: I don't know. I am asking you what you saw. Try to get your thoughts back to that night. All you are asked to do is the best you can. Did you see any lights on the train?

The Witness: The lights that I have said before, those two lanterns.

The Court: That was at the back, wasn't it?

The Witness: Yes, that is the part of the train I have seen.

The Court: From your position you could not see those lights until it was completely past the crossing; is that right?

The Witness: No, I couldn't see.

The Court: No, I am asking you. Did you see any part of the train or did you see the lights first?

Mr. Allen: I think your Honor ought to say when.

The Court: Right after his sister said, "Look out, there is a train coming." I am relating it to that time. I am not speaking of anything else.

[fol. 178] The Witness: The train had already passed the crossing when my sister said that.

The Court: What part of the train did you see when your sister said that?

The Witness: The light part.

The Court: What part, the lights or the caboose?

The Witness: The caboose.

The Court: Could you see the caboose from where you were? Your lights were shining on it.

The Witness: No, we just were looking over.

The Court: You had better start all over again. The church was about 400 feet from the crossing.

The Witness: Yes.

The Court: If you were between that church and the crossing you were about 200 feet away.

The Witness: Yes.

The Court: You were close to it. You had no power.

The Witness: No.

The Court: How fast were you going then?

The Witness: About fifteen miles an hour.

The Court: You were going about 20 to 22 feet a second?

The Witness: Yes.

The Court: It would take you 10 seconds to get down there?

The Witness: Yes.

The Court: I should like to clear up something. I think the jury and I are a little confused. If you don't know anything about the lights say so. Is this the picture of the road that you took down to the first crossing, which is Exhibit 7? Am I right?

The Court: This is the road you were on?

The Witness: Yes.

[fol. 179] The Witness: Yes.

The Court: Where is that first crossing? Does that show in this picture?

The Witness: No. It does not. This is the second crossing there (indicating).

The Court: Wait now. This is the Catholic church: isn't that right?

The Witness: Yes, that is right.

The Court: Had you passed the Catholic church when you reached the point in Exhibit 7 or hadn't you reached it yet? Just think a minute. I think I am a little confused on this and I should like to clear it up.

Is this before the Catholic church, Mr. Allen?

The Witness: No, it is past it.

Mr. Allen: If I could come a little closer I could tell you.

The Court: Don't you have some picture here that shows that?

Mr. Allen: These are the two (indicating). This is the one. These are the ones of the first crossing. This would be beyond the first crossing up by the church (indicating).

The Court: Here is the first crossing. This is Exhibit 5. This was the road you were on?

The Witness: Yes.

The Court: Which way was the train coming from the station? Here you are here (indicating).

The Witness: The station is down this way (indicating).

The Court: Coming from your left?

The Witness: Yes.

The Court: You said something about your road and the railroad tracks running parallel.

The Witness: They are. There is the road coming like this (indicating).

[fol. 180] The Court: No. No. Excuse me. This is confusing. Now I will give you every chance to clear it up.

Do you see this road here (indicating) ? That road here and the church? Do you see that; is that right?

The Witness: Yes.

The Court: And the railroad track now as you have it in your picture runs parallel, does it not?

The Witness: No.

The Court: Let us take it this way: Is this the same one?

The Witness: Yes.

The Court: What is this?

The Witness: It is part of the road after you pass the church.

The Court: Then the road is not straight, is it?

The Witness: No.

The Court: You see, if you put these two pictures together—I don't know. You will have to help me on that. Is this past the crossing (indicating)?

The Witness: Yes, this part here is past the crossing.

The Court: Then you cannot see the part of the road you traversed before you got to the railroad track in this picture, can you?

The Witness: No.

The Court: There they are not parallel, are they?

The Witness: No.

The Court: You will have to clear that up. He says they are parallel but they are not. It is this Exhibit 5. He said he saw the train at the first crossing because they were running parallel to the train.

Is that what you saw? Isn't that what you said? Isn't [fol. 181] that what you said? If it is not you had better say so.

I don't know whether that was past the crossing or getting through the crossing.

Q. Mr. Bona, I show you this Plaintiff's Exhibit 5.

The Court: They are not parallel, Mr. Brumley. Exhibit 6 or 4 might explain it, I don't know.

Q. Doesn't that photograph show the road that goes over the town crossing and beyond the town crossing where the accident happened?

A. Yes, that is right.

Mr. Allen: Which one is that, your Honor? The one that runs where?

The Court: I have gotten him into this and I think I ought to get him out of it. I think I can clear it up right away.

Mr. Allen: O. K.

The Court: You see that picture that I just showed you, this Exhibit 5.

The Witness: Yes.

The Court: Take Exhibit 4. As you were going along which way were you going? Were you coming from that building across the track that way or were you crossing the track first and then hit the building afterwards?

The Witness: No, we started from that way, coming up that way.

The Court: I see. Then in other words you were coming from where the building is in the picture, past the railroad.

The Witness: Yes.

The Court: You see, that road is straight in the picture.

The Witness: Yes.

[fol. 182] The Court: How many feet would you say that is from the railroad track?

The Witness: About 150 feet.

The Court: So the road crosses at right angles with the track and runs at right angles about 150 feet; is that right?

The Witness: Yes.

The Court: Then you see the road back here? That seems to have a bridge there, doesn't it, over some water?

The Witness: Yes.

The Court: Is that where you mean the road is running parallel with the track?

The Witness: No, we didn't take that road.

The Court: Which one is it?

The Witness: There is a bad road down there that runs parallel with the tracks.

The Court: Is that road shown?

The Witness: Yes, it takes you down to the station.

The Court: You came from the right on this picture?

The Witness: Yes.

The Court: Then the road that curves to the side of this picture is not shown in the picture.

The Witness: No.

The Court: That is the road that you say runs parallel?

The Witness: Yes.

(The Court handed the exhibit to Mr. Brumley.)

Mr. Brumley: I don't want to look at this. I want to look at this (indicating).

Q. After you crossed the town crossing you were going in the direction as shown by that mark in Plaintiff's Exhibit 5, weren't you (handing)?

A. We were, yes.

[fol. 183] Q. You stopped: how far from this crossing shown in Exhibit 5?

A. Do you mean to let the train go by?

Q. To let the train go by.

A. I would say about 100 feet.

Q. And would the place where you stopped appear on that photograph, Exhibit 5?

A. That would not.

Q. That crossing or that highway crossed at about right angles to the track?

A. Yes, that does.

Q. And it runs at right angles to the track for several hundred feet?

A. Yes, sir.

Q. It was between the Catholic church and the crossing where the accident occurred?

A. Yes.

Q. That your sister said something.

A. Yes.

Q. How far were you from the crossing when she said something?

A. We were going down that hill about 150 feet.

Q. How far from the crossing were you?

A. 150 to 200 I should say.

Q. 150 or 200 or what?

A. 200, around that distance.

Q. What did she say "The train is coming"?

A. "The train is coming."

~~Q. After she said that what did you do?~~

A. I glanced up. I was looking from behind.

Q. And at that time the train was over the crossing, was it?

A. Yes.

Mr. Allen: When you say "over" what do you mean?

Mr. Brumley: Past the crossing.

The Witness: Yes.

Mr. Allen: Towards State Line?

Mr. Brumley: Towards State Line?

The Witness: Yes.

Q. You say that you didn't see Mr. Hoffman's car at any time before the accident.

[fol. 184] Mr. Allen: I submit he was asked this.

The Court: He may be leading up to something; I cannot tell.

A. I didn't see it.

The Court: I will give you as much leeway, Mr. Allen.

Q. At the time Mr. Helfrich called did he ask you this question and did you make this answer: "Q. Did you see this car—that is referring to Hoffman's car—did you see this car at any time before the accident? A. Oh, yes."

A. No, I didn't.

Q. You didn't say that?

A. No, I didn't.

Q. When the train went by at the town crossing where you were stopped did you hear the engine bell ringing?

A. I didn't.

Q. Were you listening?

A. No.

Q. Not at that first crossing. What?

A. No.

Q. After the accident did you see the headlight on the engine?

A. I did not.

Q. What is that?

A. I did not.

The Court: He means while it was standing down there 200 feet from the accident did you see any light of the engine then.

The Witness: No, I didn't.

Q. Did you go up to Mr. Hoffman's automobile?

A. Yes.

Q. Did you look at the train?

A. Yes.

Q. How far was the train away?

A. About 200 feet I should say.

Q. And did you see any light on the train at all?

A. The only lights I have seen were two lanterns.

[fol. 185] Q. And was the caboose at the rear of the train or nearest to the crossing?

A. Yes.

Q. And you saw no headlights on the engine?

A. No.

Q. You saw no headlights on the tender?

A. No.

Q. How long were you around there?

A. About five to ten minutes.

Q. And you went back there, did you, later?

A. Yes.

Q. And when you got back there later did you see any headlight on the engine?

A. It was moved.

The Court: The train was out of sight?

Mr. Allen: It was out of sight, he said.

Q. How far had it moved?

A. Out of sight.

Q. Out of sight?

A. Yes.

Mr. Brumley: That is all.

Redirect examination.

By Mr. Allen:

Q. Mr. Bona, will you look at Exhibit 5 and tell me whether this road that is shown here which the car is on headed away from you is the road which you took down towards the Elkey Buckley crossing (handing)?

A. Yes, that is the road.

Q. And are these tracks here in the foreground the tracks of what is known as the "town crossing"?

A. Yes.

Q. I notice there are two tracks there.

A. Yes.

Q. One is siding; is that right?

A. Yes.

Q. And that runs together to the right of the road, does it not?

A. Yes.

Q. This sign up here next to the telegraph pole is the ordinary cross arm signal, "Look out for the train", or something like that, isn't it?

A. Yes.

Q. Where this road that is shown in the picture crosses the railroad track does it run parallel to the railroad track after it makes that turn as shown there in the right?

A. I didn't get that.

[fol. 186] Mr. Allen: Would you read it, please?

The Court: That wouldn't be material because my point was that he saw the train before it crossed that crossing.

Mr. Allen: Right.

The Court: He said his car was running parallel with the train then.

Mr. Allen: Yes, and I just want to clear up something along this line. I will get back to that, your Honor, if you will give me just a minute.

The Court: Read the last question.

(The last question was read.)

A. Yes.

The Court: You came around that way; is that right, and then this road, you say, runs parallel with the track?

The Witness: There is one that goes that way and one that comes down this way running parallel with this, and we were stopped on the one that was parallel to that (indicating).

The Court: No. You see, I think I had better make it clear for the jury. There is a road in the left of this picture that you can see, isn't there, that runs parallel with the track?

The Witness: Where is that?

The Court: That is the road right here (indicating). Isn't there a curve there? Doesn't that look like a road that curves?

The Witness: That is a private road.

The Court: It doesn't matter.

~~The Witness:~~ All right, it is a private road, yes.

The Court: Then the other road where this car is goes straight?

[fol. 187] The Witness: Yes.

The Court: You didn't come down the private road or you didn't come down the straight road.

The Witness: No.

The Court: You came down a road that cannot be seen in the picture on the side of the picture.

The Witness: That is the crossing.

The Court: Which way were you going? Maybe I am confused.

The Witness: We were going this way (indicating).

The Court: Oh, you were going past?

The Witness: Yes.

The Court: Oh, did you go the other way? Is it my fault. Oh, you mean you came in from the left of the picture before you even got to the tracks as the picture looks? This is Plaintiff's Exhibit 5; is that right?

The Witness: Yes.

The Court: I was twisted around. When I pointed that way you did not untwist me.

Mr. Brumley: You remember that he said he started at a point back of the picture.

The Court: All right, proceed.

By Mr. Allen:

Q. On a different road from what is shown in the picture; is that right?

A. Yes.

Q. And that road runs parallel to these tracks that are shown here; is that right?

A. Yes.

Q. When you started up you came from that road beyond the main road that is shown in the picture and went over the tracks down there where this automobile is on.

A. Yes.

Q. Looking at Exhibit 4, is that a view looking back on [fol. 188] this road shown in Exhibit 5 where the automobile is?

A: Is that the road?

Q. Looking back toward the crossing.

A. Yes.

Q. And at the time that you were standing there which side of that crossing were you on, the right or the left?

A. The left.

Q. The left?

A. Yes.

Q. And looking here very closely can you see the railroad tracks there?

A. Yes.

Q. And that railroad track runs practically parallel to the main road; is that right?

A. Yes.

Q. Mr. Bona, do you recall when this man Helfrich came to see you, and I think it was a store where you were working; is that right?

A. Yes.

Q. Do you recall when that was?

A. Not the date.

Q. About when was it?

A. I should say it was in the busy season around August I would say.

Q. Is that the first time any investigator for the railroad had come to you?

A. Yes.

Q. Did you know him at all?

A. No, I didn't.

Q. Would you recognize him if you saw him?

A. I might; I am not sure.

Q. Did he have someone else with him?

A. Yes, sir.

Q. Do you know what his name was?

A. No.

Q. Did you recall Mr. Helfrich's name until it was mentioned by Mr. Brumley here today?

A. What is that please?

Q. Did you recall Mr. Helfrich's name until it was mentioned by Mr. Brumley here today?

A. No, I didn't know his name.

Q. Was this other gentlemen here with him doing some writing there?

A. Yes.

Q. Did you know whether it was stenography?

A. I don't know.

Q. You don't know?

A. Yes.

[fol. 189] Q. At any time did they come back to you and show you what had been written out there or ask you to sign it or if it was true?

A. No.

Q. Did you see either of them afterwards?

A. Yes, and they were around a couple of times, one time

about three weeks ago and another time shortly after, the first time.

Q. They asked you questions, then, about the accident?

A. Well, the first time he didn't see me but the third time he did.

Q. Where did he come, to where you worked, at this general store?

A. Yes.

Q. Did he ask you any questions about the accident?

A. Yes.

Q. Did he have this same man with him?

A. No, but he had him in a car.

Q. Did he write anything out there then?

A. No.

Q. Did he show you anything that he had written out and ask you to sign?

A. No.

Mr. Brumley: I object. It has been asked and answered before.

The Court: Sustained.

Mr. Allen: That is all.

NORMA MARY GENNARI, called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct examination:

By Mr. Allen:

Q. Miss Gennari, how old are you?

A. Twenty.

Q. Where do you live?

A. In West Stockbridge, Mass.

Q. How long have you lived there?

A. Twenty years.

[fol. 190] Q. You were born there, were you?

A. Yes.

Q. With whom do you live there now?

A. With my brothers.

Q. Your brothers?

A. Yes.

Q. Will you keep your voice up? All these gentlemen want to hear you. What are their names?

A. Gino, Gelento, Arthur, Angelo and John.

Q. Have you any other sisters?

A. Yes. She is married.

Q. Are your father and mother dead?

A. They are not living.

Mr. Allen: May I see your pictures, Mr. Brumley, A, B and C?

Mr. Brumley: Yes.

Q. Miss Gennari, looking at this picture, Defendant's Exhibit C, I want to ask you whether you can see the house you live in in that picture. (Handing.)

A. No.

Q. You see this big building here on the left.

A. Yes. It is right across from there.

Q. Right?

A. Down across.

Q. At the corner of that do you recall whether or not that is the end of the house? Maybe I am wrong (handing).

A. I guess you are right.

Q. Is that your house at the end of that, that large building at the left?

A. Yes.

The Court: What exhibit is that?

The Witness: Exhibit C.

Q. Do you work, Miss?

A. Yes.

Q. Where?

A. General Electric in Pittsfield.

Q. You went to high school, did you?

A. Yes.

Q. Where?

A. Pardon?

Q. Where?

A. In Stockbridge, Mass.

[fol. 191] Q. Miss Gennari, do you remember Christmas Day of 1940, last Christmas?

A. I do.

Q. Were you anywhere in the afternoon of that day?

A. Yes.

Q. Where?

A. I was visiting my girl friend's.

Q. And where was that place?

A. It was across from the Catholic church around the block on the right-hand side.

Q. Does Exhibit 6 show the Catholic church to which you refer?

A. Yes.

Q. Look at this picture, Miss Gennari. Is that a picture of the opposite side of the street from the Catholic church?

A. Yes. It is.

Q. And about where was your friend's house, off that main street? Can you see?

A. It is right down in here. It doesn't show.

Q. It doesn't show?

A. Yes.

Q. It is across on the opposite side of the street from the Catholic church?

A. Yes.

Q. And down the road a little bit?

A. Yes.

Mr. Allen: I offer this picture in evidence.

Mr. Brumley: I don't think that it shows very much, your Honor.

The Court: Does it show the house in that picture?

Mr. Allen: It is not shown.

The Court: I will take it for what it is worth.

Mr. Brumley: Exception.

(Marked Plaintiff's Exhibit 17.)

Q. Miss Gennari, did you say what the name of your friend was?

A. Josephine Selva.

Q. You had gone over there on Christmas afternoon, had you?

A. Yes.

[fol. 192] Q. Do you remember what time you left Miss Selva's house about?

A. A few seconds before six.

Q. And where were you going?

A. Home.

Q. Did you expect anybody home? Did you have a date, so to speak, with some young man?

A. Yes. I did.

Q. And leaving Miss Selva's house how did you proceed to go to your home?

A. Well in order to go home I had to cross the church, go by the church.

Q. You went cross lots rather?

A. Yes.

Q. Not down the road?

A. No.

Q. Crossing from your friend's house which is opposite or across the street from the Catholic church how did you proceed as regards the Catholic church, along which side of the church building? (Handing.)

A. Along this side (indicating).

Q. That is the left side as shown in that picture, Exhibit 6?

A. Yes.

Q. And is there a path alongside that Catholic church?

A. Yes, there is.

Q. And did you frequently use that path in going from your friend's house to your home?

A. Yes.

Q. I show you this picture and ask you whether that shows the path alongside the Catholic church which you used.

A. Yes, here it is, right through here (indicating). Do you see it?

Q. That is the pathway?

A. Yes.

Q. You indicate here where it is depressed in the picture.

A. Yes.

Q. Your answer is "Yes."

A. Yes.

Mr. Allen: I offer this picture in evidence.

Mr. Brumley: This is looking out towards the road?

Mr. Allen: Yes. This is taken from back of the church looking out towards the main street.

[fol. 193] Mr. Brumley: I have no objection.

(Marked Plaintiff's Exhibit 18.)

(Mr. Allen showed the picture to the jury.)

Q. I show you this picture and ask you whether that is the rear of that Catholic church, the back.

A. Yes.

Q. And does the path which you speak of come along this side, the right side of the picture?

A. Yes. It does.

Mr. Allen: I offer that in evidence.

Mr. Brumley: I don't know the purpose. It seems that we are going into church architecture.

The Court: No, I do not think I am going to take that picture. The idea is to let her tell us where she was.

Mr. Allen: I have got to show in order to get her placed by the photographs.

The Court: Get that testimony in. Let us hear where she was first. Pictures do not corroborate whether she was at a place or not, Mr. Allen. The witness herself corroborates that. I do not know what you are going to prove by that unless you trace it back later on. We could take pictures of this girl's going to 100 or 150 places but that wouldn't mean anything.

Q. When you left your friend's home how did you proceed down towards your home?

A. Just what do you mean?

Q. How did you walk? What road did you use? What way did you walk?

The Court: What road did you use? How did you go? [fol. 194] The Witness: I walked on the lefthand side of the church down through the path.

Q. As you got to the rear of the church did you observe anything?

A. I saw a car.

Q. Where?

A. On the state highway coming south of the railroad crossing.

Q. And when you saw the crossing which crossing do you mean, the town crossing or the Elkey Buckley crossing?

A. Where the accident occurred.

Q. And from your position as you were going along the side of the church could you see the headlights of the car?

A. Yes.

Q. Did you proceed along after you saw that?

A. I did.

Q. And in order to get to your home from that path alongside the church do you have to pass over the railroad tracks?

A. Yes.

Q. And as you were proceeding from the rear of the church along that path were you listening?

A. Yes, I was.

Q. Did you hear any engine bell as you walked down there?

A. No.

Q. Did you hear any train whistle as you walked down there?

A. No.

Q. At any time did the lights of that automobile which you had seen go out of your sight?

A. As he got below the hill it went out of my view.

Q. Did you hear anything from where you were then walking towards your home after the lights of the car went out of your view?

A. Yes.

Q. What did you hear?

A. A crash.

Q. And which way was the crash, to your left as you were going towards your home?

A. Yes.

Q. What did you then do after you heard the crash?

A. I walked a few steps down and I stopped.

[fol. 195] Q. When you say, "a few steps down" do you mean steps farther; is that what you mean?

A. Yes.

Q. Then what?

A. Then I assumed that there was an accident down at the crossing, so I didn't make up my mind whether I should go down there immediately, so I crossed the track.

Q. To cross the tracks did you have to go down a little hill to get across the tracks?

A. Yes.

Q. Is there a path down there?

A. Yes.

Q. After you went down across the tracks what then did you do?

A. I kept walking a few more steps, and then I came all the way back again and decided to go down there.

Q. And when you went back how did you go?

A. The same way I came from.

Q. Do you mean up the hill?

A. The hill.

Q. Along the church until you got to the main street; is that right?

A. Yes.

Q. And then down the street to the crossing?

A. Yes.

Q. When you saw this car, as you say, coming down this main highway towards this crossing did you have any idea who it was?

A. It was going rather—it wasn't going too fast, and I thought it might be my friends.

Q. Is there a road that turns off from this main highway on the left into your house?

A. Yes, there is.

Q. Just before you get to the railroad crossing?

A. Yes.

Q. At any time from the time you got to the Catholic church up until the time you heard the crash that you speak of did you hear any bell or whistle of any railroad train?

A. No.

Q. Were you listening at that time?

A. Yes.

Q. When you got back to the crossing what did you see there? Were there people there?

A. Yes, there were people there.

[fol. 196] Q. And did you see the automobile over in the side of the tracks on the side of the road?

A. Yes. I did.

Q. Were people working there?

A. Yes.

Q. Did you see the train?

A. Yes. I did.

Q. And where was that?

A. It was past the crossing.

Q. Down towards the State line?

A. Yes.

Q. At the time you got down there had they gotten the lady out, do you remember?

A. Yes. Yes.

Q. And how long did you stay there?

A. I stayed there practically until everyone had left.

Q. Did you know the Bonas?

A. Yes. I did.

Q. Did you see them there?

A. Yes.

Q. Were there any of your brothers there?

A. Yes.

Q. Which one, do you remember? Or was there one?

A. Arthur was there and then later my other brothers came.

The Court: I am afraid I will have to stop. I cannot help you today. I think they will be waiting for me. I am so used to saying "Ladies and Gentlemen." I haven't had an all man jury in a year here. I want to admonish you gentlemen not to talk about the case and keep your ears closed to any talk that you might hear. Remember that these halls are very narrow. Return at 10:30 tomorrow morning.

[fol. 197]

Brooklyn, N. Y., November 13, 1941.

Before Hon. Matthew T. Abruzzo, U. S. D. J., and a Jury

Appearances:

(Same counsel as heretofore noted.)

Mr. Allen: May I recall Miss Gennari from the stand and put on Doctor Dorian?

The Court: Mr. Brumley, he wants to withdraw that one witness from the stand and put on Doctor Dorian. You have no objection to that, have you?

Mr. Brumley: No, I have no objection, your Honor.

JOHN S. DORIAN, called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct examination:

By Mr. Allen:

Q. Doctor Dorian, you are a physician and surgeon duly licensed to practice in the State of New York.

A. Yes, sir.

Q. For how long have you been practicing?

A. Forty-two years.

Q. Can you tell me where you obtained your medical education and training?

A. I graduated from Vanderbilt University in Nashville, Tennessee in 1899.

Q. What experience, briefly, will you tell us, have you had since then?

A. For seven years after graduation I was in practice in Niagara Falls, New York, and then I was the surgeon at two hospitals. I came to Brooklyn in 1906 and associated myself with the Long Island College Hospital. Eventually I became assistant visiting surgeon, chief surgeon in Polhemus Clinic and instructor in surgery in the training [fol. 198] school. During the World War I was chief surgeon base hospital at Camp Shelby, Mississippi. Since the war I have been consulting surgeon at the Dover General Hospital at Dover, New Jersey, associate attending surgeon at the Cumberland Street Hospital and have conducted a private practice in surgery at the Carson Peck Hospital.

Q. And your office is where, here in Brooklyn?

A. In the Medical Arts Building, 142 Joralemon Street.

Q. Have you specialized in any branch of your profession during these years?

A. Yes, sir.

Q. In what?

A. In general surgery.

Q. At my request and the request of Mr. Diamond did you make a physical examination of the plaintiff in this case, Howard F. Hoffman?

A. I did.

Q. When was that made?

A. That was made on the 11th of October this year.

Q. And where was it made, at your office?

A. At my office at 142 Joralemon Street.

Q. And at that time were certain X-ray films taken by the Mercy Hospital in Pittsfield submitted to you?

A. They were.

Q. Will you state what examination you made and what you found of Mr. Hoffman?

A. I first examined the radiographs that were submitted and found that this man had sustained a compound comminuted fracture. No, I didn't find out he had a sustained a

compound fracture, but I found out he had sustained a comminuted fracture of both thigh bones at approximately their center and that he had sustained a fracture of the fifth metatarsal bone of his left hand. I examined the man.

Q. How about the other leg, doctor?

A. Both thigh bones.

Q. Oh, both thigh bones?

A. Yes. There was a comminuted fracture of both thigh [fol. 199] bones. It was a simple comminuted fracture in the left thigh bone and a very complicated comminuted fracture in the right. The left thigh bone as shown in the later radiographs had been repaired with a Lane's plate with eight screws in it; four above the fracture and four below. The fragments of the left thigh bone at the last radiograph were in very good position, but the fragments in the right thigh bone at the last radiograph were in very poor position and there was evidence of osteomyelitis.

Q. What is that?

A. An inflammation of the bone, with death of some of the bone—the formation of what we call "sequestrum." There were pieces of dead bone that showed in the radiograph.

Q. Doctor, here are four X-rays which I don't think you saw, Exhibits 13 and 14, taken September 2nd, which Doctor Copeland brought with him from the hospital and which were not in our hands when you examined Mr. Hoffman.

The Court: You can put them up at this lamp. He can see them. Put them up here.

A. Yes, sir. No. I didn't see those radiographs before. These are radiographs that were taken after the ones that I saw. The one which I have in my hand and which is Plaintiff's Exhibit 13 shows the lower end of the pelvis, which is this line here (indicating). It shows the two thigh bones. On this side here (indicating).

Q. Will that be the left? Is that the left?

A. That is the left thigh bone. You can see this plate with the eight screws—one, two, three, four, five, six, seven—oh, yes, here is eight down here (indicating). Eight screws, four above behind the fracture and four below, but callus has filled in so that the fracture does not show so plainly. There is very good alignment. The leg is pretty

fairly straight. There is considerable mass of callus on [fol. 200] the inner side of the leg, which was not present in the radiograph that I saw before. This amount of callus has been filled in by nature since the radiographs that I saw in my office. There is no number on this one (indicating).

Q. 14. It dropped off.

A. Did I pull it off? I am sorry.

A Juror: The other one. You have got them both.

The Court: It is 14. Don't worry about it.

A. This picture here is taken just a little bit lower down. You don't see the pelvis at all here. Here the upper end of both thigh bones is gone, but you have gotten down further so that you can see the rest of the callous mass on the inner side of the left knee. You can see the fracture in the right one. You see the appearance of the two fractures is quite different. You see here many fractures extending down to just above the lower end of the femur, which has an important bearing on this particular case, because the man has trouble with his knee. The inflammation attendant upon this condition down here has limited the motion in his knee, so that when I examined his person later on I found that there was not any appreciable amount of knee motion (indicating). At the most there was only two or three degrees of motion.

Q. Do you need anything in the films or can you describe your physical examination without the films?

A. Well, there are some things that I want to point out here because the physical examination will have to mention them, and I can point them out and the jury will know what I am talking about. You can see here a piece of bone, fragments of bone lying loose in an area that is black. That is the piece of bone that is dead. You can see a different type of shadow opposite the fracture and through the callus on the other side of the thigh (indicating). The examination of the man himself revealed and I found a scar of considerable size. It was, let me see, 3 inches by 5 inches on the outer side of the right thigh, and in the center of that was a hole about a quarter of an inch in diameter. You could just about put a lead pencil through the hole without forcing it at all, and that went down through dead bone (indicating). When you put a probe down most bony tissue you can tell whether it is

alive or dead bone by the way it feels. If you strike something that is very soft and does not click, why, you know that you have live bone. It is soft and it has circulation in it; whereas if you get a sharp click then you know that you do not have live bone.

Mr. Brumley: I don't think that that is very responsive to the question, not a speech.

The Court: Yes. I do not think the doctor should be allowed to give a lecture on it. The jury has seen this X-ray before.

Q. Will you tell us what you found on your physical examination of the man?

A. I found an opening to the side of the scar, in the center of the scar; on the side of the right thigh that went down to a considerable mass of dead bone, which was that dead bone that I showed on that X-ray (indicating). The motion in the right knee was limited almost to extinction. There was some motion—a few degrees of motion—but not enough to be of any practical moment.

In the left knee I found that there was fairly good motion. He could bend his leg to right angles with his thigh, but there was considerable difference in the length of the two legs.

[fol. 202] Q. About how much, Doctor?

A. 2 inches exactly.

Q. You measured it? You measured it?

A. I measured it, yes, sir, and the right leg is just exactly 2 inches shorter than the left.

When the man stands up without his clothing you can see the tilt of his pelvis, because his pelvis on one side has to go 2 inches closer to the floor than on the opposite side in order to plant both feet on the floor, and that tilting of his pelvis causes a compensatory S-curve in his spinal column.

On the man's left hand I was able to feel the callous at the point of fracture at the fifth metatarsal bone, but there was good solid union and he could close his hand. There was some small amount of deformity but no particular amount of interference with function. There was some scars on the man's face. They were fairly noticeable but not badly so. There was one in front of the ear, another one on his chin, one across one of his upper eyelids, but

those scars were fairly small and were not so particularly disfiguring.

Q. As regards the left leg, Doctor, the one that has this metal plate, what is your prognosis regarding that leg, Doctor, with reasonable certainty?

A. Very good. He has been making very good recovery with that. Very evidently they used a vitallium plate which may not have to be removed, and considerable callous has formed, as is shown in this last picture, so it is very solid, and in time I think motion will be improved in the knee. There may be some permanent mild limitation of motion but he will have for practical purposes a good knee on the left side and a straight leg—a straight leg and a serviceable one.

Q. About how long would you say before that leg would get back to that serviceable condition that you speak of?

A. That can't be told definitely but approximately it will be about a year before he gets his maximum—a year [fol. 203] from now before he gets his maximum improvement in that leg.

Q. Now the right leg, Doctor. Can you state with reasonable certainty what your prognosis is as to the right leg?

A. The prognosis there is bad.

Q. In what way?

A. The leg there is angulated outward and forward at the point of fracture with an outward rotation of the lower fragments so that the toes on the right foot turn out farther than they do on the left. This outward bowing is due not to a faulty setting of the leg but to the fact that there is a piece of dead bone and nature is making an effort to force that piece of dead bone out and is bending the leg toward the point of least resistance, which is forward and to the outer side. That piece of dead bone will have to be removed or the leg will be considerably deformed and even union itself may be considerably disrupted.

Q. What can you say as to the flexibility of the leg in the future?

A. Full motion will never be restored to the right knee. If the sequestrum is removed soon and the condition subsides, which is problematical of course, but assuming that that is so, the knee will probably improve 50 per cent of normal motion, but if the inflammation continues in that

leg, as it frequently does in the cases of osteomyelitis, the outcome will depend entirely upon the duration of that osteomyelitic condition, but of course, there will always be 2 inches of shortening and there will always be an outward rotation, so that you are always going to have a lame man.

Q. And would that shortening have that effect on the pelvic girdle and spine that you have referred to?

A. Yes, that is a permanent condition. It can't be corrected.

Mr. Allen: You may examine.

[fol. 204] Cross-examination.

By Mr. Brumley:

Q. You didn't see those X-rays, Doctor, before today?

A. That is all I have, two.

Q. Those last two?

A. No, sir.

Q. 13 and 14?

A. No, sir; I didn't.

Q. What was the latest in point of time, the latest X-ray that you saw?

A. I can't tell you. It was some time after the Lane's plate was put in. That was about in—so I was told, in January, about the 14th, and I would judge from the appearance of the plates that they were taken some time within 30 days after the introduction of the Lane plate.

Q. As a matter of fact, the X-rays that you saw were taken on January 6 and March 10, weren't they?

A. That I don't know, sir. I don't remember. I probably saw the date at that time, but I made no memorandum of it and I don't recall.

Q. You didn't take any X-rays yourself?

A. No, sir.

Q. How long did your examination last?

A. I couldn't say. I should say an hour.

Q. What do you mean?

A. That is, just an hour.

Q. He was in your office about an hour?

A. I think so; yes.

Q. That is the first time you saw him?

A. Yes, sir.

Q. And you haven't examined him again?

A. No, sir.

Q. And you examined him at the request of his attorney?

A. Yes.

Q. And you examined him not for any purposes of treatment?

A. Not at all.

Q. You examined him to testify in court, if necessary, and—

A. And advise counsel of the condition that I found on examination.

Q. Yes. And what is your charge for your examination, Doctor?

A. \$15.

[fol. 205] Q. And you have examined other cases for Mr. Allen?

A. Yes, sir.

Q. How many?

A. I don't know. I should say perhaps four or five.

Q. Within the last year?

A. No. Within the last year I had perhaps one or two.

Q. You have examined cases for Mr. Diamond?

A. Never before.

Q. How often have you testified in court within the last year?

A. Well, I don't know; perhaps ten times. Maybe it was only six—five or six; I couldn't say exactly.

Q. What do you charge for your court appearance?

A. \$100.

Q. Did you at all confer with Dr. Copeland about this case?

A. Yes, sir.

Q. When did you confer with him?

A. Yesterday.

Q. Were you here when he testified?

A. I heard part of his testimony only. I left at noon.

Q. The X-rays that you examined or the X-rays that you have seen in court today show one piece of infected bone, don't they, in the right femur?

A. Show one large piece. There are some smaller pieces, also. There is a general infected area throughout all of the callus, but there is one piece of dead bone or sequestrum that is large enough to attract attention.

Q. That is the only piece that is disclosed by the X-ray, isn't it?

A. The only definitely large piece; yes.

Q. And it is the only definite piece shown by the X-ray as being infected?

A. No, I wouldn't say so.

Q. Can you point out any other piece of bone in Exhibit 13 or 14 in the right femur that discloses infection?

A. Yes, sir.

Q. How many other pieces are there?

A. The entire callus mass and both main portions of the bone are in aseptic condition.

Q. That is shown in the X-ray?

A. Yes.

[fol. 206] Q. Are those pieces of bone separated from the main part of the bone?

A. That main fragment that I pointed out is free in the major portion.

Q. Any other?

A. No; no others that I recall.

Q. In your opinion it would be necessary at some time to remove that piece of bone that is separated, that piece of infected or dead bone from the femur?

A. That is right.

Q. I mean that is an advisable thing to have done?

A. Oh, it is very necessary.

Q. And when could that be done, in your opinion?

A. The sooner, the better.

Q. And is that an operation under general anaesthetics?

A. Preferably so.

Q. And speaking from your experience how long would the hospitalization be for that kind of operation?

A. That would depend upon what you found and had to do after you got in there to take that piece of bone out. I don't think I would care to form a very definite opinion until I saw what was inside the leg.

Q. You said, I think that with that operation performed it might well be that he will have then a 50 per cent motion in the right knee?

A. Not immediately; but with favorable circumstances he might eventually get that much.

Q. You made a reference to a curvature in the spinal column. That is due to the two-inch shortening, isn't it?

A. Yes; that is right.

Q. In the right leg?

A. That is right; yes.

Q. In other words, the leg being 2 inches shorter, the right leg, than the left, there is this tilting of the pelvis?

A. Yes.

Q. Did you notice that that shortening was compensated for in part by his shoe?

A. Do you mean the one he is wearing now?

[fol. 207] Q. Yes.

A. I didn't notice. It could be compensated for in part by a lift on a shoe, yes.

Q. Either an external or an internal lift?

A. Or both.

Q. Or both?

A. Yes.

Q. You didn't examine his shoes?

A. Not recently, no.

Q. I mean at the time you made your examination.

A. I don't recall whether I did. I probably did but I don't recall.

Q. This curvature is not a permanent condition; I mean it occurs, this S-shaped curvature of the spine occurs when he is walking; isn't that true?

A. Yes. It is present when he is walking or standing, but it has not disappeared entirely when the man lies down.

Q. Did you make an examination—

Mr. Allen: Wait a minute. Let him finish.

Mr. Brumley: I am sorry. I thought you had finished.

A. I am sorry; because after the man's back has been in that curved position for several hours of wakefulness when he lies down to sleep or rest it will not entirely go back to a normal position, and that will be gradually increased each day as he lives, until finally there will be a permanent deformity that will stay fixed, even if he is lying down.

Q. Did you examine his spinal column when he was lying down?

A. I don't think I did.

Q. And you can't, then, tell the position of his spinal column as a result of any examination you made?

A. I don't think I would care to say. If I noticed, I have forgotten.

Q. I suppose if it is true, is it not, Doctor, that many persons have legs that are not the same length exactly?

A. Oh, yes; not the same, identical length. Yes, that is true.

[fol. 208] Q. If there is a two-inch shortening can that two inches be made up by a properly-built shoe?

A. Well, yes; he can have a two-inch lift put on the shoe. Of course, it would not be very comfortable, and it would not be very sightly, but it is true he can. He can have even more than that put on.

Q. That is commonly done, isn't it?

A. Yes. I have seen it done frequently.

The Court: He can have half put inside and half put outside, so that you can see only the little on the outside?

The Witness: Sure. It can always be done. Sure, you do it as cosmetically as possible.

Q. You were given the medical history, the surgical history, of this case, I take it?

A. Yes, I was.

Q. And based upon what was told you would you characterize the results obtained by Dr. Copeland as very excellent surgery?

A. Yes; I think he did a remarkably good piece of work, considering what he had to deal with.

Q. And you examined the hand, did you, Doctor?

A. I did.

Q. That fracture of the fifth metacarpal bone was in which hand?

A. Left.

Q. And he has full use of the left hand, hasn't he?

The Court: There is no dispute about that. They admit that that fracture has not left any permanent injury.

Q. I think you said in reference to the left leg that there had been very good progress in that?

A. Yes, sir; very good.

Q. And that the kind of plate that was inserted will make it unnecessary to have it moved in the future?

A. That is correct; yes, sir.

[fol. 209] Q. And that he will have a straight and serviceable condition of that leg; is that right?

A. I would think so. Yes, sir.

Q. And another year would show a maximum of improvement?

A. Oh, yes.

Mr. Brumley: I think that is all, Doctor.

NORMA MARY GENNARI, resumed the stand and testified further as follows:

Cross-examination.

By Mr. Brumley:

Q. Miss Gennari, do you still live in that same house?

A. Yes, I do.

Q. And you work where?

A. In the General Electric in Pittsfield.

Mr. Brumley: May I see that exhibit?

(Exhibit 19 handed to counsel by the Court.)

Q. Did you give a statement to Mr. Diamond?

A. Yes, I did.

Q. When was that?

A. The beginning of April, some time in the beginning of April.

Q. Did you give more than one statement?

A. No, I didn't.

Q. Did you sign it?

A. Yes, I did.

Q. When did you first see Mr. Diamond or anybody connected with the plaintiff?

A. That was the first time.

Q. That was in Stockbridge?

A. West Stockbridge.

Q. West Stockbridge?

A. Yes.

Q. When did you come to New York for this case?

A. Tuesday evening.

[fol. 210] Q. This week?

A. Yes.

Q. Had you been in New York about this case before that time?

A. No, I had not.

Q. Between the time you saw Mr. Diamond in West Stockbridge and Tuesday of this week had you been in New York about this case?

A. Please repeat that.

Q. I say between the time when you saw Mr. Diamond in West Stockbridge in April and Tuesday of this week have you conferred with Mr. Diamond or anybody from his office?

A. Not in New York; no.

Q. Where?

A. At my home.

Q. In West Stockbridge?

A. Yes.

Q. How many times?

A. Approximately four or five.

Q. On the afternoon of the accident you were visiting in the home of the Selva family, weren't you?

A. Yes, I was.

Q. When did you leave their house?

A. A little before six—a couple of seconds.

Q. That house is in the vicinity of the Catholic Church, isn't it?

A. Yes, it is.

Q. And on the other side of the street?

A. It is across the road on the lefthand side around the block.

Q. How far is it from the Catholic Church?

A. I couldn't tell you how far it is.

The Court: Do you mean the house she was visiting?

Mr. Brumley: Yes.

The Court: The house you were visiting is how far from the Catholic church; do you know that?

The Witness: I don't know how many feet.

The Court: Oh, he does not expect you to give it in feet or inches. You know how wide this courtroom is, don't you? How wide do you think this courtroom is?

[fol. 211] The Witness: I don't know.

The Court: You couldn't know unless you looked, Miss.

Q. I show you this Plaintiff's Exhibit 17. The Catholic church is on the right-hand side as you look at that picture, isn't it?

A. Yes.

Q. Can you see it from there?

A. No.

Q. This lower right-hand side of the picture is part of the grounds of the Catholic church, isn't it?

A. I can't see from here.

Q. I will show it to you (handing).

A. Yes, it is.

Q. The Selva house was not on the main road where the Catholic Church is located?

A. No, no.

Q. But it was on a side road?

A. Yes.

Q. Running off the main road?

A. Yes.

Q. And that side road was about opposite the church; is that right?

A. That is right.

Q. And how far down that side road was the Selva house? I mean 100 feet, or 500 feet, or 1,000 feet, roughly? I don't care much?

A. We will say between 800 and 1000 feet.

Q. Down the side road from the main road?

A. Yes.

Q. All right. You can give me back the photograph.

A. Yes (handing).

Q. You left that house that night shortly before 6 o'clock?

A. Yes.

Q. And you were alone when you left?

A. Yes, I was.

Q. And you went down the side road to the main road?

A. Yes.

Q. And then started to make a turn, a short cut, over the grounds of the church?

A. Yes.

Q. To your house; is that right?

A. Yes.

Q. You were expecting some company that night?

A. Yes, I was.

[fol. 212] Q. You expected an automobile to come to your house?

A. Yes.

Q. And as you were going along did you look for that automobile?

A. Not until I noticed the lights of the automobile that I had seen.

Q. When you noticed the lights where were you?

A. I was at the end of the Catholic church—that is, the back end.

Q. Right at the back end, were you?

A. Yes, sir.

Q. And you looked down the road toward the railroad crossing, didn't you?

A. Yes.

Q. And you saw the lights of an automobile coming in your general direction?

A. Yes.

Q. Coming toward you?

A. Yes, that is right.

Q. Where were those lights when you first saw them?

A. Quite a way up the road, the main highway.

Q. Were they up at the top of the road?

A. At the top of the hill.

Q. Yes.

A. Coming down.

Q. You saw the lights first at the top of the hill coming down; is that right?

A. Yes.

Q. And did you watch those lights?

A. Yes, I did.

Q. Did you stop walking?

A. No, I didn't stop walking.

Q. You continued to walk?

A. Yes.

Q. But you continued to look toward the left and watch the lights of the automobile?

A. Yes. I was watching.

Q. And I suppose you thought that that automobile was the one that was coming to your house?

A. Yes.

Q. And the road leading to your house goes off this main highway, doesn't it—this Route 41, that we have been talking about?

A. Pardon me?

Q. The road leading to your house goes off this road or highway?

A. Well, the side road; yes.

Q. Yes. This picture, Plaintiff's Exhibit 19, which has just been shown you, shows your house on the left-hand side of that picture; isn't that right?

A. Yes.

[fol. 213] Q. The road also appears in that picture running off from the main highway to your house, does it not?

A. Yes.

Q. And how far is that road from the railroad track?

A. Well, my side road—

Q. Your side road—

A. —leads right off the highway there.

Q. Yes; and how far is the side road from the railroad track where it leaves or leads off from the main road? I mean about how far?

A. Well, 10 feet.

Q. It is farther than that, isn't it?

Mr. Allen: Can't we agree on that?

Mr. Brumley: Maybe. I should like to know that distance. Have you got it?

The Court: Let us get the witness' idea of it. Look at the picture again. You know how much a foot is, don't you, Miss?

The Witness: Yes.

The Court: Does it look like 10 feet in that picture?

The Witness: No, it is more than 10 feet.

The Court: How much more does it look?

The Witness: Between 15 and 20 feet.

The Court: 15 to 20 feet?

The Witness: Yes.

The Court: All right. Mr. Brumley, she thinks it is 15 to 20 feet.

Q. As a matter of fact, it is more than 50 feet, isn't it?

A. No. How many feet?

Q. 50.

A. Definitely not.

Q. Definitely not?

A. That is right.

The Court: Is it as far away from the railroad track as the width of this room?

[fol. 214] The Witness: My side road is closer to the railroad track.

The Court: Than this room?

The Witness: Than the length of this room.

The Court: How much closer?

The Witness: About where he is standing (indicating).

Mr. Brumley: Brumley is my name.

The Court: Where Mr. Brumley stands?

The Witness: From that back to the room.

The Court: About how wide would you think that this room is? Look at it from wall to wall. It is pretty easy to judge, isn't it? I will tell you exactly how wide it is after you tell me what you think it is. I have got the advantage of you in having measured it. How wide do you think this courtroom is?

The Witness: It is about 30 feet.

The Court: No; it is 41 feet exactly.

Q. So you continued walking toward your house, and you also continued looking toward your left at the automobile approaching you?

A. Well, I didn't have my eyes steady right at it, but I kept looking at it practically all the while.

Q. And did you see it come down the hill?

A. Yes.

Q. Did you see it when it was on the bridge?

A. No.

Q. What?

A. I saw it right as I got off the bridge.

Q. You saw it what?

A. It had passed the bridge.

Q. You saw it after it had passed the bridge?

A. After it had passed the bridge.

Q. And was between the bridge and the railroad track?

A. That the lights were out of my view.

Q. No; but I say you saw the lights of the automobile after the car had passed the bridge?

A. You will have to repeat that.

[fol. 215] Q. I say you saw the lights after the automobile had crossed the bridge?

A. Yes; I still saw the lights.

Q. Did you see the lights of the car as the car got to your roadway?

A. That is just about where the lights went out of my view. I didn't see the lights.

Q. About opposite your roadway?

A. Yes.

Q. Did you see the car turn at all toward your roadway?

A. No, I didn't.

Q. So until after the accident you didn't know whether that car was coming toward your house or not?

A. No.

Q. Were the lights of the automobile on bright?

A. Yes; fairly bright.

Q. How fast was the car going, as far as you could tell?

A. Between 30 and 35 miles an hour.

Q. Did you see it come to a stop at any time?

A. No, I didn't.

Q. Did you see it slow down at any time?

A. It was going the same amount of speed when I saw it.

Q. Do you drive an automobile yourself?

A. No; I haven't any license, but I can drive.

Q. It was a clear night?

A. Yes, it was clear; yes.

Q. After the automobile went out of your view what did you do?

A. I continued walking, and as I walked a few seconds I heard the crash.

Q. And where were you when you heard the crash?

A. Pardon me?

Q. Where were you when you heard the crash?

A. When I heard the crash I was right by that little hut that is shown in one of the pictures there.

Mr. Allen: I don't think that was in, your Honor.

Q. How far from the railroad track were you?

A. When I heard the crash I was about 10 feet from the railroad track.

[fol. 216] Q. That is the part of the railroad track going around the bend there; is that it?

A. That is just where I have to go by.

Q. Yes, where you cross the railroad track for your home?

A. Where I have to cross it, yes.

Q. And at that time when you heard the crash you were about 10 feet from the track?

A. Not from the track; not right from the track, because the tracks is down below a little bank, like.

Q. You were near the top of the bank?

A. Yes.

Q. Over the railroad track?

A. No; not over the railroad track.

Q. Near the top of the bank at the side of the railroad track?

A. I don't know what you mean.

The Court: Were you going to go down that bank to get over the tracks?

The Witness: Yes.

The Court: How much of a bank is there? How high is the bank over the railroad tracks?

The Witness: It is not very steep.

The Court: Several feet?

The Witness: No, it is more than that.

The Court: 4 or 5?

The Witness: More. It is about 10, 11 feet.

The Court: The bank is?

The Witness: Yes.

The Court: You would go over that bank and down and then over to the other bank?

The Witness: There is no bank.

The Court: The bank on the other side is level?

The Witness: Yes.

The Court: You must have been——

The Witness: No. I was 10 feet from where I was at the end of the hut. I was 10 feet from—there is a fence that I have to go by.

[fol. 217] The Court: No. He wants to know how close you were to the railroad tracks.

The Witness: Itself, including the steep bank and everything?

Mr. Brumley: Yes.

The Witness: About 25 feet.

The Court: How far from this crossing were you when this accident happened?

The Witness: I don't know. I haven't got—

The Court: About how far?

The Witness: About 600 feet.

The Court: 600 feet?

The Witness: Yes.

By the Court:

Q. Was it the train that passed you that had this accident at any time?

A. I didn't hear it, no.

Q. Did it have to pass where you were going to cross?

A. Yes, it did have to.

Q. And you didn't hear it?

A. No.

By Mr. Brumley:

Q. When you saw the automobile coming down the hill, did you hurry to get to your home?

A. No, I didn't hurry.

Q. All the time that you saw the automobile coming down the hill your attention was directed to it, to the automobile, wasn't it?

The Witness: No—not all my attention.

Q. How long have you lived in that house?

A. All my life.

Q. And you know that train going up and down there several times a day?

A. Yes.

[fol. 218] Q. And you don't usually pay any attention to whistles or bells of the train, do you?

A. I always pay attention when I am out, but when I am inside of my home I don't exactly pay any attention.

Q. When you are outdoors you do pay attention to that; is that it?

A. If I have to go across the railroad track and if I am outside I usually hear them.

Q. If you don't have to go across the railroad track and are outside do you pay any particular attention?

A. No; no particular attention.

Q. You were not paying any attention that day to any bells or whistles, were you?

A. Yes, I was.

Q. Did Mr. Jockomo of the railroad company see you in West Stockbridge on February 26th?

A. I don't recall what his name was.

Mr. Brumley: Mr. Jockomo, are you here?

(A man stood at the rear of the courtroom.)

Q. Is that the gentleman?

The Court: I should like to ask a question.

By the Court:

Q. Do I understand you to say that you were 600 feet from the track when you heard the crash?

A. From the crossing.

Q. When you heard the crash?

A. About 600 feet.

Q. You were 25 feet from the railroad track?

A. I didn't say just 25 feet but I used my imagination. Between 20 and 25 feet.

Q. Where did you hear the crash; to your left or to your right?

A. I heard the crash to the right, to the state highway where the railroad crosses itself.

Q. If that train that had the crash continued would it [fol. 219] have passed where you were going to cross?

A. The train was going right—

Q. No. I want to know as you walked, as you were going to cross that track, you say you heard the crash to your right; is that right?

A. Yes.

Q. That train that had the crash would be going toward the station as it crossed you or coming from the station?

A. Going away from me.

Q. You get what I mean. You went down and saw this crash after, didn't you?

A. Yes.

Q. Where were you at the time you say you heard the crash? Would that train have passed where you were going to cross?

A. Yes.

Q. Or had it already passed where you were going to cross?

A. It had already passed.

Q. It would have to go past you?

A. Yes, it would have to go past me.

Q. So at the time you got 25 feet from the track this train had already passed you?

A. Yes.

Q. Did you see it pass you?

A. No, I did not.

Q. Did you hear it pass you?

A. No.

Q. You mean you could tell from how the accident happened that it must have already passed you when you got down to the crossing; is that right?

A. Well, I thought—may I—

Q. No; not what you thought. You could tell that it had already passed where you were going to cross; is that right?

A. Well, if you want to put it that way; yes.

Q. That is the way I am asking you to put it; not the way I am putting it. Is that what happened?

A. Yes.

Q. You say that this crossing was 600 feet from where you were and you say you didn't hear any bell or whistle; is that right?

A. That is right.

Q. Were you paying any particular attention to a bell or whistle 600 feet away from you at that time?

[fol. 220] A. Well, I had to go by the railroad track and I knew the train had to come by there so I was listening if I could hear a train.

Q. Why did you know the train had to come by you?

A. I had to cross the tracks in order to get home.

Q. Yes. You knew it was dangerous to cross the track without listening; is that right?

A. Yes.

Q. Of course, you didn't listen until you got close to the track?

A. Yes.

Q. You did?

A. I listened all the time.

Q. If you were 200 feet away from the track you listened, too?

A.

(The witness began to cry at this point.)

The Court: Take your time, Madam. All right, proceed.

Q. Do you want a glass of water?

A. No.

The Court: All right; withdraw her for a while. Go on to something else.

Sit down a little while, Madam. We will call you later on. Take it easy.

Mr. Brumley: Does your Honor want to take a five minute recess?

The Court: No. I would rather go right through. We have lost so much time.

All right, Mr. Allen. We will give her a rest. Call another witness.

[fol. 221] LILLIAN HAZEL BONA, called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct examination.

By Mr. Allen.

Q. Mrs. Bona, are you the wife of Laurence Bona?

A. Yes, I am.

Q. And you live in Farnams, Massachusetts.

A. I do.

Q. With your husband; is that right?

A. Yes.

Q. You keep house there, do you?

A. Yes.

Q. And also do you go to work?

A. I do.

Q. Where are you working, Mrs. Bona?

A. Right now I am working for Dale Brothers Laundry.

The Court: Try to keep your voice up, Madam, so that they can hear you in the back.

The Witness: Yes.

Q. Do you remember Christmas afternoon of last year, 1940, Mrs. Bona?

A. I do.

Q. Do you remember that afternoon? Do you?

A. Yes.

Q. Had you been out in the car with your husband?

A. Yes. Yes, we went to a movie in Pittsfield.

Q. Who else was with you?

A. My sister-in-law and brother-in-law.

Q. That is, Arthur Bona and Edna Bona.

A. Yes.

Q. And did you come back to West Stockbridge along in the late afternoon?

A. Yes.

Q. And did you stop anywhere?

A. Yes. We went downtown.

Q. In the village?

A. Yes.

Q. And stopped there, did you?

A. Yes.

Q. And did you hear or see any train when you were down there?

A. As we were parked there by the railroad tracks we noticed the train go by us, but didn't pay particular attention to it.

Q. You don't know how many cars were in it?

A. No.

[fol. 222] Q. After the train went by did your husband start the automobile?

A. Yes.

Q. And you proceeded then across what is known as the town crossing?

A. Yes.

Q. Down toward what is known as the Elkey Buckley Crossing?

A. Yes.

Q. At any time as you proceeded down there did something happen to your automobile if you know?

A. Yes.

Q. About where were you then, Mrs. Bona?

A. In front of the Catholic church.

Q. Where were you seated?

A. In back of my brother-in-law, in the back seat.

Q. On the right-hand side, then, in the back?

A. Yes.

Q. Do you know whether or not anybody opened any door of the car then?

A. Yes, both doors were opened.

Q. And were you talking at that time in the car or were you listening?

A. We were listening.

Q. Did you hear any bells or whistles of any kind while you were listening?

A. No.

Mr. Brumley: I submit that we ought to know what she was listening for.

The Court: I will take it for whatever force the jury wishes to place on it. It is the sole province of the jury to say whether they were listening for a bell or a whistle. She says they didn't hear and they can say whether she was listening for it; I do not know. It is for them.

Q. Did you hear any bell or whistle?

The Court: Were you listening for any train bell or train whistle?

The Witness: Yes, because the train had passed up at the town crossing and we knew it was going to come back. [fol. 223] The Court: How far is that from the track, do you know?

The Witness: In front of the Catholic church.

The Court: How far is that?

The Witness: I don't know about distance.

The Court: 400 or 500 feet?

The Witness: Yes.

Q. About 500 feet you say?

The Court: You want us to understand that 500 feet from the railroad track with your own car broken down you were trying to listen for a train bell or whistle or a train that you had seen pass you?

The Witness: Yes, naturally, because the car had moved and kept right on moving. The car kept on moving. We didn't stop.

Q. You were listening all that while from the Catholic church?

A. Yes.

Q. Going down there did you hear anything?

A. No.

Q. Did anyone make any remark in the car as you went down there?

A. Yes, as we were descending down the hill my sister-in-law hollered. She said, "Look out, there is a train com-

ing." We lifted our heads and looked in that direction. We saw this light coming towards this way.

Q. Which side as you were going down?

A. On the lefthand side.

Q. On your lefthand side you saw a light coming?

A. Yes.

Q. Was that the first you had seen of any light down there at the railroad crossing?

A. Yes.

Q. As you got nearer the crossing did you see anything else?

A. Yes. On our lefthand side in a sort of a ditch there was some steam or smoke coming up. One of us hollered— [fol. 224] I can't remember which one of us—but one of us hollered, "There has been an accident." Then my husband descended across the railroad tracks and went to the parked car.

Q. On the other side of the railroad tracks?

A. On the other side of the tracks.

Q. On the righthand side of the road?

A. Yes.

Q. When you got down there did you see any light up the tracks towards State Line?

A. Yes. This light was shining down the track toward us.

Q. Towards you?

A. Yes.

Q. Did you get out of the car, Mrs. Bona?

A. Yes.

Q. What did you do if anything?

A. Well, we all got out and my husband hollered for a flashlight and my brother-in-law was getting out of the car and got the flashlight and brought it back and gave it to my husband. My sister-in-law stood by the fence there and we stood by there looking down. I didn't dare go near it.

Q. Did your husband help the lady? Did you see that?

A. My husband hollered, "There is a woman in the car," and we started in that direction to see if we couldn't take her out. My sister-in-law and I started to—there was a lot of stuff scattered around by the track there, and we started to pick it up to see if we knew who was it, to see if we couldn't find any identification.

Q. What kind of stuff?

A. There was instruments and oranges as though a suitcase had been opened. Clothing was hanging around. Clothing had been opened. We thought by the look of it—by looking at it we could find some identification to see just who was it.

Q. After your husband got the lady up on the bank did you try to get the man out?

A. Yes.

Q. Did you?

A. Yes.

Q. Did some people go down from the train with lanterns?

A. Yes. By then the men from the railroad—the train—had already gotten there with lanterns.

[fol. 225] Q. Did other people from the train come?

A. Yes.

Q. How long did you stay there, Mrs. Bona?

A. I stayed there the entire length of the accident, until everybody had almost gone.

Q. How did you go home?

A. There was a fellow standing there after everybody had gone it was kind of cold, so my sister-in-law and I asked him if he would not give us a ride up to the house.

Mr. Allen: I see. You may examine.

Cross-examination.

By Mr. Brumley:

Q. This accident to your automobile occurred about opposite the Catholic church?

A. Yes.

Q. And did it make some noise while your car was going down the hill?

A. A slight click.

Q. Just a slight click?

A. Yes.

Q. And before this accident were the windows of your car closed?

A. No. I definitely remember my husband had turned the window down when we were by the first railroad crossing and it stayed down.

Q. Are you sure about that?

A. Yes, I am positive about that.

Q. You were in the back seat?

A. Yes.

Q. Back of the driver?

A. No; on the righthand side.

Q. On the righthand side?

A. Yes.

Q. And then from the Catholic church on you were listening for the train, were you?

A. Yes.

Q. And were you also looking ahead all the time?

A. Yes, I was.

Q. Looking toward the railroad track?

A. Yes.

Q. And did you see any train go over the crossing?

A. No.

Q. At any time did you see a train go over the crossing?

A. No.

[fol. 226] Q. Did you see any automobile coming toward the crossing?

A. No.

Q. Did you hear any collision or crash?

A. We were up at the Catholic church and were going down. We heard a loud noise coming in front of us, in the direction in front of us, but we didn't know at that time what it was.

Q. Where were you when you heard that loud noise?

A. Just, say, about 50 feet from the Catholic church toward the crossing.

Q. And were you looking toward the crossing at that time?

A. Yes, I was.

Q. And had you been looking toward the crossing from the time you left the Catholic church?

A. Yes, after we found out and my husband hollered that there had been—what happened to the car. I kept looking toward the crossing because the car was coasting down the hill, and I was afraid because of the train. I knew the train was going to go by, and I was afraid; so I hollered to him to slam on his brake and stop the car before we got to the crossing.

Q. But you didn't see the train?

A. No, I didn't see the train.

Q. And you didn't see the collision?

A. No.

Q. But when you got down some distance down below the Catholic church nearer the crossing you heard a crash?

A. No. We were not very far from the Catholic church before we heard that crash.

Q. Where were you when your sister said, "Look out. There is a train coming"?

A. We were descending down the hill. The exact distance I could not tell you.

Q. What did you see when she said that?

A. All I could see was this big headlight. I suppose the train had already gone across, and was going toward in that direction (indicating). It was just a short time before the train came to a full stop.

[Vol. 227] By the Court;

Q. What train?

A. We saw this big headlight.

Q. No, no. Speak for yourself only.

A. All right, then. My sister-in-law.

Q. You say your sister-in-law said, "Look out for the train"?

A. Yes. She says, "Look out. There is a train coming."

Q. Where were you at that time?

A. Descending downhill.

Q. How far down had you gotten?

A. I could not say.

Q. About half-way?

A. No, not quite half-way.

Q. All right. Did you look up then?

A. Yes, I looked up.

Q. What did you see then?

A. I looked in that direction and I could see this big headlight shining down toward us, and we kept on looking, and I saw this thing in the gully, and it was smoking. There was smoke or steam or something-like that coming up, and one of us hollered. I can't say which one it was hollered, "There has been an accident." Just then my husband pulled to the side of the road, across the railroad tracks, and all the while our car was moving. We crossed the tracks on the righthand side and came to a stop. Then my husband got out and my brother-in-law and us two girls got out and went over to this accident. Then my husband—

Q. Oh, no. You have told us that before. What we want to know is, when you looked up you saw this headlight, or

that headlight to your left or to your right as you were going down?

A. To our left.

Q. How far were you from the railroad track at that time?

A. Oh, I couldn't say. All I know is we were descending down this hill. The exact feet I can't say.

Q. Could you say whether that headlight was moving or not when you saw?

A. We didn't pay exact attention, because we saw the headlight, because that is all we paid attention to, because [fol. 228] right after we saw this headlight we saw this car in the gully.

Q. Wait a minute. You hadn't gotten to the crossing?

A. No. We hadn't gotten to the crossing.

Q. When you saw that headlight to the left what did it indicate to you?

A. The train was either coming or had got back by us, because the train had gone that way (indicating).

Mr. Allen: Indicating to the left.

The Court: Indicating to the left, and it had already gone that way?

The Witness: Yes.

Q. Was it moving at any time that you saw it?

A. To tell the truth, I don't remember.

The Court: Go ahead.

By Mr. Brumley:

Q. When you say you saw the light to your left, how far was it from the crossing?

Mr. Allen: What do you mean?

Mr. Brumley: The light.

A. I couldn't say the exact distance.

Q. You didn't see the collision, did you?

A. No, we didn't see the collision.

The Court: You see, Madam, you are including everybody else. You don't know what the others saw. You can speak only for yourself. You did not see it. Is that right?

The Witness: No, I didn't see it.

[fol. 229] Q. You got out, and did that light continue to shine?

A. Yes; after I got out I just give one slight glance up the track and I could see this light shining down toward us, but after that I didn't pay any attention to the train, because we were trying to help. My husband was trying to get the people out of the car, and I went for a blanket and a pillow to put under the woman's head.

Q. How long were you there?

A. I was there the length of the accident, until everybody had almost gone.

Q. When your sister called out in substance, "Look out. There is a train coming," you were looking right ahead yourself, weren't you, at that time?

A. I was looking ahead; but when she hollered we all turned.

Q. And it was then that you saw this light to your left?

A. Well, not right away, because our car kept moving all the while. We were getting closer to the crossing all the time, when she hollered that, so that by the time we had got there, well, we did see the light. Yes, I could see it shining this way (indicating). But whether the train was moving or whether it had come to a full stop I can't say.

Q. When you did see the light had you gotten to the crossing?

A. No; not quite to the crossing.

Q. But you didn't see the light then until you were almost on the railroad track; is that right?

A. Yes.

Q. Was that light moving at that time?

A. I don't remember.

Q. Was that a big light?

A. Well, fairly good-sized. It shone down the track quite a ways.

Q. And at that time did you see the automobile in the ditch?

A. Yes.

Q. And you don't know whether the train was moving or not moving at that time, when you first saw the light?

A. When I first saw the light, I don't know.

Q. But you were right over the crossing, didn't you?

A. No.

[fol. 230] Q. The car went over the crossing, over the railroad track?

A. By the time we had gotten down to the railroad track we saw the accident and we knew the train had gone by

there and hit the car, because how else could it have happened?

Q. I say, you went beyond, over the railroad track, without stopping?

A. Yes; because we had seen this car.

Q. Never mind why. But you did?

A. Yes.

Q. You didn't see any light of a train when it went over the crossing, did you?

A. Which crossing do you mean?

Q. This railroad crossing where the accident occurred.

A. No, no.

Q. And were you the first to arrive at the scene of the accident?

A. No. My husband was.

Q. I mean your car.

A. Yes.

Q. And from the top of the hill, then, you, although you were in the back seat and not driving, were listening for a whistle or bell?

A. Yes.

Q. And from the top of the hill, that is about opposite the Catholic church, you were looking all the time toward the railroad crossing?

A. More or less; yes.

Q. And you were expecting a train to go over that crossing, were you not?

A. Yes.

Q. How long do you estimate it took you to go from the—withdrawn. When the accident to your car occurred, the rear end accident, did you stop at all?

A. No.

Q. How fast did you go down the hill to the railroad crossing?

A. Oh, I should say about 15 miles an hour.

Q. And how far were you from the railroad track when the accident occurred?

Mr. Allen: I object.

A. I don't know.

The Court: He means the accident to her car.

[fol. 231] Q. The accident to your car.

Mr. Allen: Oh, that is all right.

A. The accident to my car?

Q. How far from the railroad track?

A. Oh, I should say about—as I estimate in front of the Catholic church I think that is about 500 feet.

Q. And that is where your husband and your brother-in-law in the front seat opened the doors?

A. Yes.

Q. They didn't stop when they opened the doors? They didn't stop the car, did they?

A. Well, he just put on his brakes a little bit and it slowed up the car to a certain extent, almost to a stop, but it didn't come to a full stop.

Q. Going down the hill your husband continued to drive the car?

A. Yes.

Q. And he continued to hold the door open on his side?

A. Yes.

Q. And he continued to look back?

A. No.

Q. He didn't look back?

A. He looked back for a little while. He was driving. He had to look at the road.

Q. And your brother-in-law on the right side held his door open?

A. Yes.

Q. And he continued to hold it open until you got to the railroad crossing?

A. Yes.

Q. And he continued to look back from the Catholic church to the railroad crossing?

A. I can't remember that.

Q. He was right in front of you?

A. All right. But I was looking at my husband.

Q. I thought you were looking at the railroad track.

A. In front of me, yes. But at an angle also, but I was looking at my husband. I didn't pay no attention to my brother-in-law.

[fol. 232] Q. Why were you looking at your husband?

A. I couldn't tell you.

Q. You were in back of him?

A. I know I was in back of him, but—can I tell it in just my own way?

Q. Yes.

A. All right. We were coming to this railroad crossing, and every time something goes wrong with the car, I am just like a back seat driver, and I keep looking at my husband and looking at the tracks at the same time for fear, and he had his door open—well, I was scared; that is all.

Q. You were scared?

A. Well, maybe the door would blow open, or whatever it was. I don't know what it was, but I kept looking at him.

Q. All the way downhill?

A. Not directly at him. I was looking at the road at the same time.

Q. You were looking at the road and you were listening for a whistle and you were listening for a bell and you were watching him, weren't you?

A. Yes.

Q. You were afraid that he might fall out?

A. Yes.

Q. Yes. Did he continue to hold it open all the way downhill?

A. Well, not as wide as he had it at first but he had it open.

Q. When your sister called out, "Look out! There is a train coming," did anybody in your car do anything?

A. No.

Q. You just went on?

A. Yes.

Q. Did you give a statement to Mr. Diamond?

A. Yes.

Q. How many cars were there in that train; do you know?

A. No.

Q. You didn't examine it after the accident?

A. No.

Q. Do you know whether when you got there after the accident this headlight was on the read end of the train?

Mr. Allen: Of what?

[fol. 233] Q. On the last or rear end of the train.

A. It was on the end of the train because it was shining right down the track.

Q. There was nothing between you and the light to obstruct your view?

A. I didn't pay any particular attention. When I did glance up the railroad track I saw this light coming down.

but it was right there in front of the train, or whether there was something obstructing it I can't remember.

Q. Going over the crossing in the town before this crossing, before you went over the town crossing, you came to a stop, didn't you?

A. Yes.

Q. And did you look at the train when it went by?

A. No. We were parked there, and all of a sudden we heard the noise of the train go right by us, and I just glanced up my head and put it down, put it right down again. I didn't pay no attention.

Q. You were not waiting, then, near the train crossing for the train to go by?

A. No. We stopped quite a few feet from the crossing.

Q. How far did you stop from the town crossing?

A. Why, I couldn't say, to be exact.

Q. About how far?

A. Oh, I should say about 100 feet.

Q. And how long did you stop there?

A. Not an awful long time.

Q. About how long—a second, a minute, five minutes?

A. Well, I should say about three or four minutes.

Q. Why did you stop at that place?

A. We had something to say and just thought we would stop to say it instead of saying it while the car was moving.

Q. Did you hear the train coming along?

A. No; not until it had got right by us. We didn't pay—I didn't see it or hear it.

Q. You didn't see it?

A. That is right.

[fol. 234] Q. Did you look?

A. When it went right by us, yes, sir.

Q. Where had you driven from?

A. Well, the main highway in the town goes down—

Q. I mean where was your starting place that afternoon?

Mr. Allen: Starting place?

Q. Where did you start to drive that afternoon?

A. We started from my mother-in-law's and headed towards Pittsfield to a show.

Q. You were going to a show?

The Court: They were coming home from a show.

Mr. Allen: They were coming from a show by this time. Is that what you mean?

Q. You lived in West Stockbridge?

A. No, I didn't live in West Stockbridge.

Q. Where did you live?

A. I lived in Farnham.

Q. How far is that from West Stockbridge?

A. That is about 23 miles.

The Court: Mrs. Bona, did you stop at the town crossing?

The Witness: Yes.

By the Court:

Q. If you stopped at the town crossing, as you say, and then you continued on, that next crossing is some distance away, is it?

A. Yes.

Q. If you stopped for three or four minutes you couldn't possibly get to that second crossing in time to see that same train cross, could you?

A. Right after!

[fol. 235] Q. No, no. You had better keep your mind on the question.

A. I am trying to.

Q. You saw this train at the town crossing?

A. Yes.

Q. When you got to the next crossing, that is the crossing that the accident happened at; isn't it?

A. Yes.

Q. All right. You certainly were not expecting to see this train at that crossing, were you?

A. I don't know whether we were expecting to see it; but I know that the road runs parallel with the track.

By Mr. Brumley:

Q. You were approaching the crossing with the idea of looking for any train that might be coming; is that right?

A. No, I was looking for that particular train, because the highway crosses.

The Court: Just wait for a minute. If you stopped back there for three or four minutes, you couldn't be at the next crossing in time to see the train?

The Witness: No. We had been parking there before. After the train came by, we went right across.

Q. Tell us why you parked there and what you were talking about.

A. Oh, all right. My husband went in for cigarettes.

The Court: You said you were talking. What were you talking about, now?

The Witness: I am trying to tell you. My husband went in for cigarettes, and we all stopped because we all wanted to have a smoke, and we all stopped. We were just talking while we were lighting the cigarettes, that is all.

[fol. 236] The Court: You stopped while he went in for cigarettes; is that right?

The Witness: No. We stopped at the railroad tracks to light our cigarettes, just for a little chat, and that is all.

By the Court:

Q. Where had you stopped to get the cigarettes?

A. I couldn't tell you just how much it was in the town, but the main highway comes this way and then it comes in the main street of the town and there is just a short-cut—maybe two houses this way; and there is a store this way (indicating). So he stopped in the store and ran in for cigarettes, but the store was closed, so he turned around and we stopped right there this way (indicating). That is where the tracks run parallel to the road, and we had stopped right there.

By Mr. Brumley:

Q. How far away was the store; how far from the town crossing was the store where he got the cigarettes?

A. I couldn't tell you that.

Q. After he got the cigarettes and he came back to the car and the car started up, didn't it?

A. Yes.

Q. Then you drove up to within 100 feet or so of the town crossing, didn't you?

A. I should say it was more, more than 100 feet.

Q. Whatever the distance you say.

A. You see, I couldn't tell you exactly, because it comes around the corner like this (indicating).

By the Court:

Q. You stopped somewhere. It doesn't matter where, for some distance, from the railroad crossing but it was [fol. 237] about 100 feet from the railroad crossing?

A. But the distance where we were parked from the store I don't know.

Q. Then you stopped your car and stayed three or four minutes near the railroad crossing in order to light your cigarettes and talk?

A. Yes. We were not close to the railroad crossing.

By Mr. Brumley:

Q. You were within 100 feet of it?

A. Yes.

Q. That is what I mean by "close".

A. Yes.

Q. You had how many miles to go?

A. 23 miles.

Q. Oh, weren't you going home?

A. We were not going home.

Q. Where were you going?

A. You are going into personal matters now, but if you want me to, I will tell you.

The Court: He has a right to an answer to the question.

The Witness: All right. If you want me to answer them, all right.

By the Court:

Q. Where were you going?

A. We were going back to Pittsfield. We wanted to go see another show, so that we just decided to turn around and go back. It was Christmas Day, and we thought we ought to go and have a good time and see another show.

By Mr. Brumley:

Q. So you stayed three or four minutes near the railroad crossing within 100 feet of it?

A. Yes. We were debating whether we ought to go back to Pittsfield or to go back directly home.

Mr. Brumley: That is all.

[fol. 238] Re-direct examination.

By Mr. Allen:

Q. Mrs. Bohn, did you give a statement to anybody from the railroad company?

A. Yes, I did.

Q. You signed one for them, did you?

A. No.

Q. Do you know who was the man who got that?

A. His name I don't know.

Q. Do you see him around here in the courtroom at all?

A. No.

Q. Was he a man named Helfrich, do you remember?

A. Well, they said it in court so I presume that is what his name is, but then, I don't know. I didn't know then.

Q. After he had taken your signed statement from you did he come to see you again a second time or did he come to see you only once?

A. He came once and had a secretary or a man with him and took down a lot of what we were talking about in shorthand, and then he came two weeks ago and took a statement, which I signed.

Q. Yes. And at that time did he ask you anything about your coming to New York,—this man Helfrich?

A. He asked me if somebody had offered us a trip to New York, and I said no. My husband was in the kitchen, and he said, "I wouldn't mind going to New York"; and I stood right there by him, by the door, and I says, "I wouldn't mind going to New York, because I have never seen New York. I would like to see it." And he turned around and he says to me, "If you'd said that you heard a bell or a whistle, you would get your trip to New York", he says, "but you didn't say that", he says, "so you don't get it."

The Court: Wait a minute, now, Mr. Allen.

By the Court:

Q. What man is that from the railroad? I want you to tell me what man you think it is. Do you see him in the courtroom? Look around in this courtroom.

[fol. 239] Mr. Allen: Is Mr. Helfrich here?

The Court: Wait a minute, now. It may not be Mr. Helfrich at all. This lady is making a very serious charge against somebody.

The Witness: I wouldn't know who it is.

Q. Is he here?

A. No, he is not here. He told me his name.

Q. Did he tell you what his name is?

A. I don't remember.

The Court: Will you have Mr. Helfrich here?

Mr. Brumley: Yes.

The Court: All right. Let this other man stand up.

(A man stood at the rear of the courtroom.)

The Court: Is it this gentleman?

The Witness: No.

Q. When did that happen; how long ago?

A. About two weeks ago.

Q. Where?

A. At my home.

Q. Who was there at that time?

A. My husband was in the kitchen, and there was two other men with him, and myself.

Q. Two other men were with Mr. Helfrich?

A. No; one other man with Mr. Helfrich, if that is his name.

Q. Do you remember what this man's name was?

A. Yes; but there were two other men with my husband.

Q. He said to you if you had said there was a bell ringing or a whistle blowing he would have given you a trip to New York?

A. Something similar.

Q. No; is that what he said?

A. Just what he said.

Q. He said if you had said there was a bell rung or a whistle blown he would have given you a trip to New York?

A. He said, "If you'd said that there was a bell, that [fol. 240] you heard a bell or a whistle, you would get your trip to New York."

Q. What did you say to that?

A. I didn't say no more. He just started leaving.

Q. What did your husband say?

A. He didn't say anything. He didn't pay no attention, because the men were on their way out.

The Court: That is all.

By Mr. Allen:

Q. Was it the same man who got you to sign the statement?

A. It was the same man that came the first time from New York.

By the Court:

Q. Who is paying your expenses to New York? Are you paying them yourself, Madam?

A. No.

Q. Who is paying your expenses?

A. Mr. Diamond. He asked us to come up to testify and our expenses are being paid.

Q. Who is paying them?

A. By him, I believe.

Q. Who has paid you your expenses? Are your expenses being paid?

A. Well, they are paying our hotel bills and our meals.

Q. What hotel are you at?

A. St. George Hotel.

Q. How did you come down; by car?

A. By train.

Q. Who paid your railroad fare; do you know?

A. Mr. Diamond.

The Court: That is all.

By Mr. Allen:

Q. Is there a slight grade from the Catholic church down toward the railroad track?

[fol. 241] The Court: Wait a minute. There are persons in this courtroom who seem to get a great joy out of it. There is a young man in the second row. Stand up and leave this courtroom. I will not tolerate anyone in this courtroom giving expression by smiling or in any other way to what he thinks. You stay out, unless you are called as a witness.

Q. Do you know the road coming the other way has a slight grade in it?

A. It has.

Mr. Allen: That is all.

The Court: All right. Return at two o'clock.

(Recess taken until 2 P. M.)

Afternoon Session

(2 P. M.)

LILLIAN HAZEL BONA, resumed the stand and testified further as follows: .

Recross-examination.

By Mr. Brumley:

Q. Mrs. Bona, you made mention before lunch of a conversation with a representative of the railroad?

A. Yes.

Q. That took place in your home, do you say?

A. Yes.

Q. And about when?

A. Two weeks ago.

Q. Do you remember the name of the person who talked to you?

A. No.

Mr. Brumley: Will Mr. Helfrich stand up?

(A man stood at the rear of the courtroom.)

[fol. 242] Q. Is that the gentleman?

A. Yes.

Mr. Brumley: All right.

Mr. Allen: Indicating whom?

Mr. Brumley: Mr. Helfrich.

Q. Just repeat, now that he is in court, what he said to you in connection with your coming to New York.

A. He was getting ready to leave and going out of my living room into my hall. My husband sat in the kitchen, cleaning the gun, and he turned around and he says to me, "Did anybody offer you a trip to New York?"

Q. Who said that?

A. Mr. Helfrich.

Q. Yes. He said, "Did anybody offer you a trip to New York?"

A. And I said, "No," and my husband said, "I wouldn't mind going to New York," and then I said, "I would like a trip to New York because I have never been there," and he says to me, "If you'd said that you heard a bell or a whistle, you would get your trip to New York."

Q. And then he walked out, did he?

A. No, he sat there. He kind of walked into the kitchen and sat there holding a conversation with my husband about—there was this other fellow with him, and they were holding a conversation about the gun that my husband was cleaning, and they just held that conversation like that, but that is all that was said about the trip to New York.

Q. And when he had that conversation with regard to the trip to New York, was this other man with Mr. Helfrich?

A. Yes, he was standing there.

Q. And was there anybody there besides your husband?

A. Yes; there was two of my husband's friends in the kitchen with him.

Q. The kitchen is right next to the room in which this conversation took place?

A. Yes, it is a hall, and it leads right into the kitchen.

[fol. 243] Q. One or two other questions, Mrs. Bona: Mr. Helfrich did call to see you back in July, didn't he?

A. Yes, I believe that is when it was.

Q. Some time before this—

A. Yes?

Q. The last time?

A. Yes.

Q. He had a man at that time with him who took some notes, a reporter, or a stenographer?

A. Yes.

Q. Do you remember at that time of the first visit that you told Mr. Helfrich that you couldn't say whether the whistle was blown or whether it was not?

A. No.

Q. Did Mr. Helfrich say this to you as well as to your husband, who was present: "Mr. Helfrich: But you wouldn't say that the train did not whistle before it got to the crossing?" Then did you say: "I wouldn't say the same. I couldn't say whether it did or whether it didn't."

Mr. Allen: I object to the question.

A. No.

The Court: Wait a minute.

Mr. Allen: I object to the form of the question. He didn't ask what she said. What that question was asked about was something about what happened in there—

The Court: Wait a minute. Please read that question again.

Mr. Brumley (reading):

"Mr. Helfrich: But you wouldn't say that the train——"

The Court: Addressed to whom?

Mr. Brumley: Addressing it to both, and I am asking whether Mrs. Bona didn't say to that question, "I wouldn't say the same. I couldn't say whether it did or whether it didn't."

[fol. 244] The Court: Did you make that answer to that question?

The Witness: No.

Q. Later did Mr. Helfrich say this to you: "From where you were in West Stockbridge would you say the train didn't whistle at any time from the time it went through West Stockbridge until the time of the accident?" And did you say then, "I wouldn't say"?

Mr. Allen: I object to that, as not being at all contradictory of the testimony—"any time you went through West Stockbridge."

The Court: No, I will take it.

Q. From the time it went through until the time of the accident; did you say "I wouldn't say"?

A. Would you mind repeating that?

Q. Did Mr. Helfrich ask you this question and did you make this answer; the question is this: "From where you were in West Stockbridge would you say the train didn't whistle at any time from the time it went through west Stockbridge until the time of the accident?" Did you make that answer to that question, "I wouldn't say"?

A. No, I can't remember saying that.

Q. Did you also say this: "Mrs. Bona: I wouldn't put my foot in it and say it didn't and say it did"?

A. No.

Q. You never said anything like that to Mr. Helfrich?

A. No.

Mr. Brumley: That is all.

Further redirect examination.

By Mr. Allen:

Q. Was it after that time when you say Mr. Helfrich was with you that he had a man taking down notes that he

[fol. 245] came to you again and had written out that statement and did you sign it?

A. Yes, two weeks ago. He had written out a statement and had me sign it.

Q. He had you sign it?

A. Yes.

Q. Have you ever seen that since?

A. Not since I signed it.

Mr. Allen: That is all.

EDNA LENA BONA, called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct examination.

By Mr. Allen:

Q. Mrs. Bona, where do you live?

A. Pittsfield.

Q. Are you employed or are you doing anything?

A. Yes, I am a student.

Q. A student?

A. Yes, at St. Luke's Hospital.

Q. Speak a little louder. I don't think we can hear you.

A. St. Luke's Hospital.

Q. Do you mean studying to be a nurse?

A. Yes.

Q. Where do your parents live?

A. West Stockbridge.

Q. And you are a sister of Laurence Bona?

A. Sister.

Q. Sister of Laurence Bona?

A. Yes.

Q. Are you?

A. Yes.

Q. Do you remember Christmas afternoon?

A. I do.

Q. You had been at Pittsfield and came back to West Stockbridge; is that right?

A. Yes, sir.

Q. You stopped up there near the town crossing, did you?

A. Yes.

Q. Do you remember any train going by there?

A. Yes, sir. As it was going by I noticed it.

Q. Yes, and after it went by did your brother start up going toward the crossing?

A. Yes.

[fol. 246] Q. Do you recall that there was some trouble with the car or something happened to the car as you were going down there, to your car, I mean.

A. Yes.

Q. When you came from the town crossing up toward the Catholic church, is it a slight upgrade there to the Catholic church or about up to the Catholic church?

A. Very slight.

Q. And then there is a slight downgrade; is that it?

A. Yes.

Q. After something happened to your car do you know whether the boys in the front seat opened the doors or not?

A. They did, both of them.

Q. Did you hear any engine bell or whistle from that time on down?

A. I didn't.

Q. As you were going down from the church towards the crossing did you notice anything?

A. Yes, sir. I noticed a light to the left of me.

Q. From which side did the light come as you were going down?

A. To the left.

Q. To your left side?

A. Yes.

Q. Do you know about how far down you got from the Catholic church towards this crossing when you noticed this light to your left?

A. About half way.

Q. Did you do something?

A. Yes. I told my brother to look out, the engine was coming.

Q. And your car was still keeping on toward the crossing?

A. Yes, it was.

Q. When you got nearer to the crossing did you see anything there?

A. I saw the steam and smoke from this car that was down in the gully.

The Court: There is a gentleman here who cannot hear you. You had better speak loudly so that they can all hear you back here.

The Witness: I saw steam and smoke from this car that was down in the gully.

[fol. 247] The Court: Suppose you sit up there and talk right out loud. Don't get too comfortable or you won't be able to talk up. Sit up straight and talk right out.

Q. Coming from where?

A. The gully.

Q. I mean did you go across the track and stop on the right side of the road?

A. Yes.

Q. Did the men get out and go over to the automobile?

A. Yes.

Q. And did you and Mrs. Bona get out?

A. Yes.

Q. And you saw the lady there that was laid out on the embankment by Mr. Bona and some of the other men; is that right?

A. Yes.

Q. And did you see them work to get Mr. Hoffman out from under the wheel of the car?

A. Yes.

Q. Is that right?

A. Yes.

Q. About how long were you there altogether?

A. Practically about an hour it must have been at least.

Q. And did you notice any light up the railroad towards State Line after you got down toward the track?

A. I didn't notice the direct light.

Q. What is that?

A. I didn't notice the direct light.

Q. Did you notice some light up that way?

A. Yes.

Mr. Allen: That is all.

Cross examination.

By Mr. Brumley:

Q. Did you hear the crash?

A. Yes, I heard a noise; I didn't know what it was.

Q. What kind of noise?

A. Some noise.

Q. What?

A. A noise from the distance. Ahead of me it was.

Mr. Allen: Speak up a little louder, now, Miss Bona, if you can.

[fol. 248] Q. What did it sound like?

A. I wouldn't be able to make a noise like it.

Q. Did it sound like a crash of an automobile?

A. It started like a crash; a bump.

Q. Was that after or about or at the time you called out?

A. After.

Q. The crash was—the sound of the crash—was after you called out?

A. Yes.

Q. What did you call out?

A. I said to my brother, "Look out! Here comes the engine."

Q. Where were you when you called out? Where was the car?

A. About half-way down the hill.

Q. About how far from the railroad track would that be?

A. About 400 feet, about.

Mr. Allen: A little louder, please.

The Witness: About 400 feet.

Q. That was your car?

A. Yes.

Q. How fast were you going at that time?

A. It must have been around 15 miles an hour.

Q. And you were sitting in the back seat on the left-hand side, were you not?

A. Behind the driver.

Q. What is that?

A. Behind the driver.

Q. Yes. And you were looking ahead all the time going down the hill?

A. Yes, I was.

Q. And what was it that you saw that caused you to call out?

A. A light.

Q. Where was the light?

A. To the left of me.

Q. And was it moving?

A. I couldn't tell.

Q. What did you call out? What did you say?

Mr. Allen: She just answered that.

Mr. Brumley: I am asking her again.

A. I said, "Look out! Here comes the engine."

[fol. 249] Q. When you said that, wasn't the light moving?

A. I didn't notice if it was moving. I just saw the light.

Q. About how far from the highway was the light when you first saw it?

A. Do you mean from the crossing?

Q. From the crossing.

A. Oh, about 200 feet up.

Q. You can't tell us now whether that light at any time between the time you first saw it and the time you went to the crossing moved?

A. No, I couldn't.

Q. Did you keep your eye on the light?

A. I did.

Q. After you called out you heard the crash?

A. Yes.

Q. How long after you called out, "Look out! There is a train coming", or something substantially like that did you hear the crash?

A. Right after that.

Q. And how far were you from the railroad track when you heard the crash?

A. Please repeat that.

Q. And how far from the railroad track were you?

A. Half-way down the hill—around there.

Q. Half-way down the hill?

A. Down the grade; down the grade.

Q. Down the hill, you mean?

A. Yes, sir.

Q. That would be how many feet from the track?

A. Maybe 300.

Q. Before that crash did you see any automobile coming toward you?

A. No.

Q. Or any lights of any car or automobile coming toward you?

A. No.

Q. Before that crash did you see any train go over the crossing?

Mr. Allen: Keep your voice up.

A. I did not.

Q. And when you first saw the light it was to the left of the highway, wasn't it?

A. Yes.

Q. I forget now how many feet you said. About how many feet?

A. 200, I think I said.

[fol. 250] Q. Now, can you tell us whether that light was at the rear end of the train?

A. I can't.

Q. Did you look afterward, after you came to a stop to ascertain where the light came from?

A. I didn't.

Q. After you saw the light about 200 feet to your left you heard the crash; is that right?

A. I beg pardon?

Q. After you saw the light 200 feet to your left you heard this noise?

A. I mean to say that I heard it before but I saw it.

Q. But you did say "after", did you not?

A. That was a mistake.

Q. A mistake?

A. As we went by the Catholic church I heard the noise.

Q. But didn't you say a few minutes ago that you heard the noise after you saw the light?

A. I was mistaken. I heard it first.

Q. Now you say you heard the noise when you were at the Catholic church; is that right?

A. Yes. I heard a noise then.

Q. What noise did you hear then?

A. I don't know; a bang.

Q. A loud noise?

A. Not too loud.

Q. Looking down from the Catholic church, the roadway opposite the Catholic church, could you see the crossing?

A. Looking at the Catholic church, you say?

Q. No; looking down from a point opposite the Catholic church on the road that you were could you see the crossing?

A. No.

Q. Are you sure about that?

A. Positive.

Q. When you heard the bang what did you think it was?

A. I didn't know.

Q. Did you pay any more attention to it?

A. Not at that particular time. I just was wondering.

Q. And when you got 200 feet from the railroad track you saw the light for the first time?

A. Yes.

[fol. 251] Q. Did you see an automobile there then?

A. I noticed a light first of all.

Q. When did you first notice an automobile?

A. When my brother said it. He said, "Look, there is a car down in the gully."

Q. Where were you when you first noticed the automobile?

Mr. Allen: Do you mean when she personally?

Q. Where were you, going down-hill?

A. Going down-hill.

Q. Did you cross the railroad track?

A. No.

Q. You were near the railroad track?

A. Quite near it.

Q. You were still moving?

A. Yes.

Q. Was there any smoke coming from the automobile?

A. I don't know if it was smoke or steam.

Q. You didn't see that until you got near the railroad track; is that it?

A. I saw it when my brother hollered. He said, "There must have been an accident."

Q. Do you remember Mr. Helfrich called on you; didn't he?

A. Someone called, but I don't know who he was.

Mr. Brumley: Will Mr. Helfrich stand up?

(A man stood at the rear of the courtroom.)

Q. Is that the gentleman who called on you?

A. I couldn't recognize him. He was a tall fellow; that I remember.

Q. Did a man come with another man who took notes?

A. Yes.

Q. Do you remember being asked this question: "Q. Did you hear the crash?" and do you remember this answer:

"A. My brothers did. I was too busy screaming, I guess."

A. I didn't say that.

Q. You didn't say that?

A. No.

[fol. 252] Q. Were you asked this question and did you make this answer: "Q. What do you mean, screaming?"

And your answer: "A. I hollered because I saw the train coming down. I saw the train coming down, and I always was scared of trains, and I hollered to my brother to be careful."

A. I didn't say that.

Q. You didn't say that?

A. No.

Q. Are you sure?

A. Yes. I am quite sure I didn't say that.

Q. Are you sure?

A. I said I am quite sure.

Q. Do you remember that? Are you entirely sure that you didn't say that?

A. My recollection is I didn't say that.

Mr. Allen: Will you concede that the reasonable value of the services of Dr. Persing was \$202?

Mr. Brumley: Yes. I told you I would.

The Court: Dr. who was that?

Mr. Allen: Persing. That is the doctor who came to the scene and assisted Dr. Copeland at the hospital.

There is a question of law, your Honor, I think we might step up and discuss, if you will.

The Court: Yes, surely.

(Discussion at the bench between the Court and counsel, not within the hearing of the reporter.)

Mr. Allen: Now I am going to ask your Honor to take judicial notice of the fact that according to the American experience mortality tables, the expectancy of a person 22 years of age is 40.

Mr. Brumley: Wait a minute.

Mr. Allen: For Mrs. Hoffman. Her expectancy was forty.

Mr. Brumley: Wait a minute. I didn't mean to interrupt you. I think that is wholly irrelevant under the Massachusetts statutes.

[fol. 253] The Court: Why?

Mr. Brumley: The measure of damages is culpability.

The Court: What do you mean—culpability of what?

Mr. Brumley: It is sometimes formed in terms of blameworthiness or the degree of negligence.

The Court: This is offered for the question of amount.

Mr. Brumley: The amount does not depend on that-at all, on the life expectancy or on the status of the woman.

The Court: What does it depend on?

Mr. Brumley: On the culpability.

The Court: You mean that they have got to first find the defendant guilty? What do they assess damages on?

Mr. Brumley: Degree of culpability. I admit it is terrible, but that is the statute.

The Court: You had better give me the statute and we can reserve on that, too.

Mr. Allen: Yes. The plaintiffs rest.

Mr. Brumley: May I have that record?

The Court: Oh, yes. Let the record show that during the course of the examination of the witness Lawrence Bona the attorney for the defendants called for the statement which he claimed to have signed for the plaintiff, and the Court apprised the attorney for the defendants that if he called for that statement and looked at it, it would open the door for the plaintiffs to offer that statement in evidence; and if that were done the Court would receive that statement in evidence. That is the rule that is followed by the Judges in this District.

[fol. 254] Thereupon, Mr. Brumley refused to avail himself of the statement, and took exception to the Court's ruling, and the record should show that an exception is allowed on that ruling to Mr. Brumley. I believe that covers it.

Mr. Brumley: If I could have about two minutes I could line up this faster. May I have that?

The Court: You have not made any motion yet. He rested.

Mr. Brumley: Oh, has he rested?

The Court: Yes.

MOTION TO DISMISS

Mr. Brumley: I move to dismiss the complaint first upon the ground that the plaintiffs have failed to prove any negligence on the part of the defendant in respect of the claims made in the complaint; on the further ground that the plaintiff has not sustained the burden of proof as to those claims of negligence; on the further ground that it appears affirmatively that plaintiff did not proceed cautiously toward the crossing in accordance with the provisions of the Massachusetts law, particularly Section 15

of Chapter 160. It also appears that under the Massachusetts law the plaintiff's wife, Mrs. Hoffman, would be considered in the custody of the plaintiff and any negligent act by him would prevent recovery by her estate. Any act therefore on her behalf under the death statute of Massachusetts depends upon active diligence on the part of the driver of the automobile. Therefore, both as to failure of sustaining the burden of proof as to negligence and the violation of the statute in failing to proceed cautiously with active vigilance there can be no recovery for her death.

Then as to his cause of action: he also has failed to prove negligence. The evidence is affirmative that he did not proceed cautiously; that he was not actively vigilant. Also, it [fol. 255] appears that he was contributorily negligent at common law.

Now as to her cause of action, going back to that for a second, that is defeated if there has been failure to actively be careful.

As to his cause of action, there would be a failure under the statute if he did not exercise active vigilance or if he were guilty of contributory negligence. In other words, his cause of action, as I interpret it, would have two possibilities—hers being a death action, if there is any violation by the driver of the statute in failing to actively be vigilant, her cause of action would fall.

I am not going at this time into the question of burden of proof. I am going to submit a memorandum to your Honor on that point.

The Court: Yes. We will leave that alone. Make your full motion in legal terms, first, and we will take that up later at the end of the case.

Mr. Brumley: Yes.

The Court: I am going to take something else up with Mr. Allen. I don't know in just what form you want these questions submitted to the jury. You have evidently severed the two causes of action into—in each case; one common law and one statutory. If you expect me to send them to the jury in that form, and that is what I think you expect me to do, then I have got to send special questions to the jury on each action. Will you get up the special questions on each one?

Mr. Allen: Yes, sir; I will do that.

The Court: Because based on the answers to these questions will naturally be based the motions that you make later on.

Mr. Allen: Yes.

[fol. 256] The Court: All right. For the moment, in order to preserve the record, Mr. Brumley, are you finished for the moment?

Mr. Brumley: Yes.

The Court: I will reserve decision for the moment, and then take that up later on.

Mr. Allen: May I ask, Mr. Brumley, whether you have a copy of your memorandum? Because I submitted mine to you.

The Court: Yes, give him a copy.

Mr. Brumley: I gave the Court mine.

Mr. Allen: Oh, excuse me; I did not want to get it ahead of you, your Honor.

The Court: You got it ahead of me.

Mr. Brumley: I am advised that Chapter 90, Section 15, I meant to say, when I said Chapter 60, Section 15.

The Court: I think you will be forgiven for that.

Mr. Brumley: I hope so.

The Court: I have not seen either one.

Mr. Brumley: I am submitting another copy of a memorandum to Mr. Allen.

The Court: All right. We will take that up later on.

Mr. Brumley: All right. May I now have my two minutes for my witnesses?

The Court: Now, Miss Gennari, please.

[fol. 257] NORMA MARY GENNARI resumed the stand and testified further as follows:

The Court: All right, Mr. Brumley. Proceed.

Mr. Brumley: May I have the last question, the Judge's question and mine?

(The record was read as previously recorded.)

Cross-examination.

By Mr. Brumley (continued):

Q. Where was this automobile that later turned out to be Mr. Hoffman's, when you last saw it before the collision? Did you get that question?

A. Yes. I was——

Q. No; where was the automobile?

A. The automobile was just past the bridge.

Q. Had it reached that point on the highway about opposite your road?

A. Not quite.

Q. So at a point not quite opposite your road it disappeared from your view; is that right?

A. Yes.

Q. And up to that time it hadn't reduced its speed?

A. No, I don't think it had.

Q. You did hear a collision, didn't you?

A. Yes.

Q. Give us an idea about how much time elapsed between the time that you last saw the automobile and the time when you heard the collision.

A. About five or six—seven seconds.

Q. Might it have been one or two seconds?

Mr. Allen: I object to that, your Honor, to what "might have been." She has given her best estimate.

The Court: Yes; sustained.

Mr. Brumley: Exception. I thought on cross examination that could be brought out, your Honor.

The Court: What was her answer—5 to how many seconds?

[fol. 258] The Witness: Seven.

The Court: Five to seven seconds?

The Witness: Yes.

Q. You did give a statement, did you not, to Mr. Jockomo of the railroad company about February 26, 1941?

A. I don't know whether that is his name or not.

Mr. Brumley: I think Mr. Jockomo is here. Will Mr. Jockomo stand up?

(A man stood up at the rear of the courtroom.)

Q. Is that the gentleman?

A. Yes.

Q. Who came to see you?

A. Yes.

Q. And you gave him a signed statement, did you not?

A. Yes, I did.

Q. I show you these three sheets of paper and ask you

whether you signed all of them. Is this your signature, down at the bottom of all of them?

The Court: Just look at your signature, Miss, and see if it is there.

A. Yes.

Q. You read over that statement before you signed it?

A. Yes; I did (handing to Mr. Brumley).

Mr. Brumley: I offer it in evidence.

Mr. Allen: May I see it, your Honor?

The Court: Yes.

Mr. Allen: There is no objection.

(Statement referred to marked Defendants' Exhibit E in evidence.)

(Mr. Brumley read Defendants' Exhibit E to the jury.)
[fol. 259] Mr. Brumley: And the five pages are signed by Miss Gennari and witnessed by Mr. Jockomo.

That is all.

Redirect examination.

By Mr. Allen:

Q. Miss Gennari, I believe you have said as to the place you proceeded and first saw the automobile you were about the rear of the church; is that right?

A. Yes.

Q. I show you this picture and ask you whether that shows the rear of that church.

A. Yes.

Mr. Allen: I offer that in evidence.

Mr. Brumley: That was, I think, offered yesterday.

The Court: I will take it.

Mr. Brumley: It does not show any relation to the crossing.

The Court: I will take it.

(Marked Plaintiff's Exhibit 20.)

Q. And I believe you said that you heard the crash as you were somewhere near the hut that was in the rear of the church; is that right?

A. Yes.

Q. Is this the hut that you referred to (indicating)?

A. Yes, it is.

Mr. Allen: I offer that in evidence.

Mr. Brumley: No objection.

(Marked Plaintiff's Exhibit 21.)

Q. And is this the embankment on which the hut is in the rear of the church and which you had to go down to get to your house (handing)?

A. No, it is not.

[fol. 260] Q. That is not?

A. No.

Q. About how high is that embankment above the tracks that you had to go down to get to the tracks leading to your house, Miss Gennari?

A. From the bottom of the railroad track?

Q. Yes; from the top of the bank where this hut is that you speak of down to the railroad track; about how many feet would you say?

A. About 20 feet.

Q. And then does this show the railroad track that you were going to cross and the path to your house when you got down that embankment (handing)?

A. Yes.

Mr. Allen: I offer that in evidence.

Mr. Brumley: I don't see any relevancy, your Honor.

The Court: I will take it.

Mr. Brumley: I beg your pardon.

The Court: I will take it.

(Marked Plaintiff's Exhibit 22.)

The Court: I suppose, Mr. Allen, if there were fifty witnesses and if you took pictures of every step we would never get through. I told you that yesterday.

Mr. Allen: Correct, your Honor.

The Court: The only testimony that has any probative value that this witness gives is whether or not there were any signals given and whether or not she was there or she was here does not matter, and that is what we are interested in. I suggest to you that there are fifteen to twenty witnesses in this case. If I allowed a picture of every step

that every witness took, we would not be through here for a month.

[fol. 261] Mr. Allen: Correct. This is the last one I am going to offer, your Honor.

Q. Does this show the embankment that you referred to?

A. Yes.

Q. It does?

A. Yes.

Mr. Allen: I offer it in evidence.

(Marked Plaintiff's Exhibit 23.)

Mr. Brumley: Now we are looking away from the crossing.

Mr. Allen: You are looking up toward the road.

Mr. Brumley: Yes, away from the crossing.

Q. When you saw this automobile that you referred to, was that on your left hand, or on your right?

A. On my left hand.

Q. When you heard this noise of the crash was that on your left hand or your right hand?

A. My left hand.

Q. On your left hand?

A. Yes.

Q. And do you know about how far it is from the point where you would get on the path leading to your home, as shown on Exhibit 22, up to the left to the crossing? About how far is that?

A. About 700.

Q. 700 feet?

A. Yes.

Q. And is there a curb there from that point from where you reached the path to your house up to the crossing?

A. Yes.

Q. Miss Gennari, when you gave this statement to Mr. Jockomo and signed it, did you say anything to Mr. Jockomo whether you heard any bells or whistles? Did he ask you?

The Court: No, no. I will not permit the question in that form, sir.

[fol. 262] Q. Did Mr. Jockomo ask you anything as to whether you had actually heard bells or whistles?

A. Yes.

Q. And what did you tell him?

A. I told him that I didn't hear any.

Q. Either bell or whistle?

A. Yes.

Q. Now, did you say anything to him when he asked you about bells or whistles other than saying you did not hear them?

A. When he asked me, he asked me if I was paying attention.

Q. Yes.

A. And I told him that in order—when I got by the tracks I listened for a bell or whistle because my life is in danger whenever I cross a track and so forth.

Q. Did he ask you more than once whether you heard bells or whistles; do you remember?

A. Yes; he asked me many times.

Q. How many times did he ask you?

A. I can't remember how many times, but quite a few times.

Q. Did you make any remark to him about the number of times he asked you?

A. I told him that I didn't hear any and that was all there was to it; that I didn't want to hear about it any more.

Mr. Allen: That is all.

The Court: Miss, in that statement you said you read it before you signed it, didn't you?

The Witness: Yes.

By the Court:

Q. Did you read it? Did you read each page before you signed it?

A. I guess—

Q. No, no. Did you read each page before you signed it? That is a very simple question.

A. He read it to me.

Q. No. I am asking you, did you read it?

A. No, I didn't read each page.

[fol. 263] Q. Do you remember when Mr. Brumley asked you whether you signed it and you said you did?

A. Yes.

Q. He asked you whether you read each page before you signed it, and you said you did, didn't you?

A. I don't remember.

Q. That was only three minutes ago. You did say that you read each page before you signed it; is that right?

A. I don't remember if I did.

Q. Do you want him to read it to you?

The Court: Get right to the beginning of the statement where she is asked whether she signed each page, and read it.

(Record read by reporter.)

The Witness: Yes, I said that he read it. May I say something?

The Court: No, no. It is all right.

Q. Did you read each sheet? That is all we want to know.

A. Now that I remember, he read it to me.

Q. You did not read it yourself?

A. No.

Q. That answer was a mistake?

A. Yes.

The Court: That is all.

FRANK THOMAS JOHNSON, called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

Direct examination.

By Mr. Brumley:

Q. Where do you live, Mr. Johnson?

A. West Stockbridge.

Q. How long have you lived there?

A. All my life. Born there.

[fol. 264] Q. How old are you?

A. Forty-nine.

Q. How long have you been employed by the New Haven Railroad?

A. Twenty-six years.

Q. How long have you been a conductor?

A. Four years.

Q. And how long have you worked up and down that part of Massachusetts?

A. Practically all since I have been on. Practically all the while I was in Pittsfield.

Q. Do you remember the night of December 25, 1940?

A. Yes.

Q. What was your job that night?

A. I was conductor that night.

Q. What train was that known as?

A. That was known as an extra.

Q. Where did it run from?

A. Why, we went from State Line to Great Barrington, Great Barrington to Pittsfield and from Pittsfield back to State Line.

Q. Before this accident were you at Daly's?

A. Yes.

Q. Daly's is what? Is it a place in Massachusetts?

A. Yes.

Q. How far is Daly's from State Line?

A. 9 miles.

Q. Is it a single track railroad between Daly's and State Line?

A. Yes, sir.

Q. How far is it from Daly's to the crossing where this accident occurred in West Stockbridge?

A. About a little over 7 miles.

Q. Leaving Daly's what did your train consist of?

A. Just an engine and a caboose.

Q. And leaving Daly's what was the order of the train?

A. We were backing up with the caboose back.

Q. You were backing up?

A. Yes.

Q. That means what?

A. The engine was backing up first and then the caboose back of the engine.

Q. And the tender of the engine was then first, was it?

A. Yes. Yes.

[fol. 265] Q. And then the main part of the engine?

A. Yes.

Q. And then the caboose on the rear.

A. Yes.

Q. What engine did you have that night?

A. 438.

Q. I show you this photograph and ask you whether that is a picture of that engine 438.

A. Yes. It is.

Mr. Brumley: I offer that in evidence.

The Court: Let me see it.

Mr. Allen: There is no objection.

(Marked Defendants' Exhibit F.)

Q. So as you were moving that night from Daly's to the place of the accident the tender was first?

A. Yes.

Q. And then your engine?

A. Yes.

Q. And then the caboose on the nose of the engine?

A. Yes. Yes.

Q. Is that right?

A. That's right.

Q. And I notice in this photograph there is a light on the forward end of the tender.

A. That's right.

Q. Was that light there that night?

A. Yes.

Q. And do you know whether approaching the crossing it was lighted or not.

A. Yes, sir.

Q. And do you know where it was lighted?

A. Right on the back of the tender.

Q. Well, I mean—

A. We lit up at Daly's or I mean the engineer.

Q. You know that?

A. Yes. I know that.

Q. And can you tell us what kind of light it was?

A. Well, a perfect light, one of them big—

Mr. Allen: I move that "perfect" be stricken out.

The Court: Yes. What kind of light was it? Describe it.
[fol. 266] The Witness: One of them electric lights with a big bulb.

Q. Where does it operate from?

A. From the engine.

Q. Do you know what the number of watts is?

A. 90 watt I think.

Q. What is that?

A. 90. I think. I ain't certain about that.

Q. And there is a reflector in that headlight, is there?

A. There is, yes.

Q. What time did you leave Daly's?

A. We left Daly's at 5:40.

Q. That is 5:40 P. M.?

A. Yes. 5:40 P. M.

Mr. Brumley: I will just pass that to the jury.

Q. Where were you riding approaching the crossing at West Stockbridge where this accident happened?

A. Why, just before you get to this accident I live right there back of the hill. Right after the whistle blew I waited—

Mr. Allen: No.

The Court: That is not the question. The question is where were you riding? Strike it out.

The Witness: I was riding up in the cupola on the left-hand side of the cupola.

Q. The cupola is part of the caboose?

A. Yes.

Q. Describe it a little more.

A. It is up out of the way. You know where you can watch it. It sets up out of the floor about 10 feet away.

Q. What were you doing?

A. I was up there sitting down.

Q. Was anybody else in the caboose with you?

A. Yes, the flagman and brakeman.

[fol. 267] Q. What was the flagman's name?

A. Cook. A. H. Cook.

Q. And the brakeman's name?

A. J. R. Lawless.

Q. Who was the engineer?

A. Harold McDermott.

Q. And who was the fireman?

A. Harry Meach.

Q. What was the weather condition that night?

A. Clear. Clear weather.

Q. There is a grade crossing, is there not, in the town of West Stockbridge?

A. Yes, sir.

Q. Near the railroad station?

A. Yes.

Q. After passing that crossing what is the next crossing?

A. Elkey's crossing.

Q. Elkey's crossing?

A. Yes. Some call it Buckley's crossing.

Q. Some call it Buckley's Crossing?

A. Yes.

Q. That is where the accident happened?

A. Yes.

Q. Is there a whistling post for the crossing?

A. Yes, sir.

Q. How far is that from the crossing?

A. About 300 feet.

Q. Did you or did you not hear any signals given for Elkey's crossing?

A. Yes. I did.

Q. What did you hear?

A. Two long and two short repeated.

Q. Where did the whistle start?

◆ Right at the whistling post, the first one.

Q. Do you know where that whistling post is?

A. Yes. Yes.

Q. When you say "two long and two short" what do you mean?

A. Why, two long whistles and two short whistles.

Q. Then you said "repeated." What do you mean by that?

A. They blow the same whistles again, when they get nearer the crossing.

Q. So did you hear eight whistles blown between the whistling post and the crossing?

A. Yes, sir.

[fol. 268] Q. How long before the crash did the last whistle blow?

A. It blew darn near up to the crossing.

Q. "Darn near up to the crossing"; is that right?

A. Yes. Yes.

Q. What about the bell? Is there a bell on this engine?

A. Yes.

Q. How is the bell operated?

A. Automatic. Just turn it on and it keeps ringing until you shut it off.

Q. Where is that turned on, in the engine cab?

A. Yes, right at the engineer's feet.

Q. Is that whistle also operated from the engine cab?

A. Yes.

Q. That night approaching the crossing did you hear any bell?

A. Yes. The bell was ringing continually.

Mr. Allen: "The bell was ringing" what?

The Court: Continually.

The Witness: Continually. When you turn it on you would have to keep ringing until you shut it off.

Q. Where was the engine when you first heard that sound?

A. Right in back of the Catholic church.

Q. And did it continue to ring?

A. Yes, it continued to ring.

Q. Do you know whether it was still ringing after the accident?

A. I am pretty sure it was. I don't think he ever shut it off at all.

Q. Approaching the crossing how fast would you say you were going?

A. I should say 15 miles an hour.

Q. Did you at any time feel the brakes go on?

A. Just when we hit that car.

Mr. Allen: I move to strike it out, your Honor.

The Court: May I have that answer?

(The last answer was read.)

The Witness: I felt the brakes go on.

[fol. 269] Q. You felt the brakes go on or heard the brakes go on about at the crossing?

A. About at the crossing.

Q. After the accident at the crossing how far did your train go north of the crossing?

A. I should say about 100 feet, maybe a little more.

Q. That is the rear end of the caboose?

A. Yes. Yes.

Q. What time of night was it that this accident occurred?

A. Well, it was practically about 6:10.

Q. Immediately after the accident what did you do?

A. I went down to get Doctor Persing and went after him with some of these—

Q. Don't talk so fast, Mr. Johnson.

A. I went down to get Doctor Persing and somebody else had got him ahead of me, I believe.

Q. Did you after the accident observe whether the headlight on the tender was going?

A. It was. You could see it all the way up towards State Line.

Mr. Allen: I move that the latter part of the answer be stricken out after "it was."

The Court: No.

Mr. Allen: Exception.

Q. Then after the collision was the headlight on the engine itself going?

A. I didn't see that.

Q. Coming up to the crossing was the headlight on the engine as distinguished from the headlight on the tender lighted?

A. That tender light was lit or lighted.

Q. Was the engine light lighted approaching the crossing?

A. No. No, it was not.

Q. After the accident did you examine the tender and engine?

A. Yes, sir.

Q. And what did you observe?

A. Why, the step was broken. The step on the tender of the engine.

Q. Did you observe anything else?

[fol. 270] A. And the place in the center of the engine where you climb up on—the steps—they were broken right off entirely.

Q. Now I will ask you to show me in Defendants' Exhibit F—may I come in?

The Court: Yes, surely.

Q. You say where the steps were broken.

A. This step there was bent right up and these steps were taken right off entirely (indicating).

Mr. Brumley: May I have your pen?

The Court: Yes. Let us have it. Come in, Mr. Allen. You had better say that again. Which ones were bent?

The Witness: This step right here (indicating).

The Court: The steps where the X is put were bent. These steps were bent (indicating).

The Witness: Yes.

The Court: We will put the letters S. X.

Q. Where was the step that was broken?

A. Here were two steps taken right off here (indicating).

The Court: The step where the S. X. is put were taken right off.

The Witness: Yes.

Q. When did you observe it?

A. Right after the accident.

Q. Within a few minutes?

A. Within a few minutes, yes.

Q. Don't answer this if there is any objection; what did that damage indicate to you as to what the cause was?

[fol. 271] Mr. Allen: I object.

The Court: Sustained.

Mr. Brumley: Exception. Massachusetts Advance Sheets page 1199, 1941.

The Court: You were pretty sure you were not going to get that through yourself.

Mr. Brumley: They allow it in Massachusetts, you know.

The Court: We are not up there now.

Q. Mr. McDermott, the engineer, is dead?

A. Yes, he is.

Mr. Brumley: Will you concede that?

Mr. Allen: If you say so surely.

The Court: Do you know when he died?

The Witness: He died in this big—

Q. When was it?

A. He died in this big wreck they had at Woodrow.

Mr. Allen: When?

The Witness: Well, I couldn't tell you just the date. I imagine one of their men over there could.

The Court: He is dead anyhow, you are sure of that.

The Witness: He is dead, I am sure of that.

Q. Going to State Line that night you were going to the terminus of your run, were you?

A. That's right.

Q. Were you on overtime at that time?

A. Well, we were a little bit. We went to work in the morning at 8:30. We was not on too much. We was on some, yes.

Q. So you were getting overtime.

A. Yes, time and a half after eight hours.

Q. So you were not in any hurry to get to State Line.

A. Oh no, I was not.

[fol. 272] Mr. Allen: Oh, I object to that.

The Court: Yes.

Mr. Allen: I move to strike it out.

Mr. Brumley: Exception. I think that is all.

Cross-examination.

By Mr. Allen:

Q. Mr. Johnson, you had started out that morning from State Line; is that right?

A. Yes, that's right.

Q. Yes, and then you were going to Great Barrington?

A. Great Barrington.

Q. And then to Pittsfield?

A. Yes.

Q. You were on the way back to State Line when this thing happened.

A. Yes, that's right.

Q. When you left Pittsfield did you have any train?

A. Yes, we had cars at Pittsfield, four, five or six, something like that.

Q. Where did you leave them off?

A. We left them at Daly's, a place we call Daly's.

Q. And how were you proceeding when you came to Daly's, with your engine in reverse, backing?

A. No. No. Oh no. We go through what we call a "hack back."

Q. You are going too fast.

A. We go through what we call going around the hack. We go around the hack on the other end and then we go back to State Line.

Q. You left them at Daly's?

A. We left them at Daly's.

Q. And turn around there, is that it?

A. And turn around the caboosse.

Q. And then attach the caboosse on the pilot end of the engine; is that right?

A. That's right, yes.

Q. What time did you do that?

A. Well, we must have been doing that around—

Q. No, what time did you?

A. About 5:30 I should say.

Q. Of course, you got what you call a "train sheet," didn't you?

A. Yes, we did.

[fol. 273] Q. And that gives a record of your movements.

A. Yes.

Q. You told Mr. Brumley that from Daly's all the way to the point where this accident happened was a single track.

A. Yes, sir.

Q. There are some sidings off it?

A. Oh yes, yes.

Q. Is Daly's north or south or west of West Stockbridge?

A. South.

Q. South?

A. Yes.

Q. So you were moving then in a generally northerly direction toward State Line.

A. Yes. Yes.

Q. Does your record show the exact time you left Daly's that day?

A. Yes. We have to mark it every time we get to a place and every time we leave.

Q. Did you look at your records?

A. Yes.

Q. That shows you left there at 5:40?

A. Yes. That shows we left there at 5:40.

Q. Was it dark then?

A. Yes.

Q. When was it dark?

A. When we got there.

Q. You got there about 5:30?

A. We got there about 5:30.

Q. When did you put your light on at Daly's?

A. Before we left Daly's.

Q. Did you have any lights on your engine burning, coming down from Pittsfield?

A. No. You don't have to have that coming down. Everything was light yet.

Q. When you came into Daly's it was dark?

A. It was just getting dark when we came into Daly's.

Q. Did you have your headlight on the engine coming down from Pittsfield at any time before you got to Daly's?

A. No; you didn't have to.

Mr. Allen: I move that the latter part be stricken out, "You didn't have to."

The Court: The answer "No." stands. The rest is stricken out.

[fol. 274] Q. You didn't?

A. No.

Q. Are you sure of that?

A. Yes.

Q. Where were you riding?

A. We were coming down from Pittsfield.

Q. Yes. Where were you riding?

A. In the caboose.

Q. How many cars did you have?

A. Three or four. I couldn't say for sure.

Q. Riding in the caboose could you see whether there was a headlight on the engine?

A. You could see.

Q. Where were you riding?

A. I said in the caboose I was riding.

Q. On the ground floor of the caboose or up in the cupola?

A. Up in the cupola.

Q. Were you riding in the cupola?

A. Yes. Yes.

Q. As you were riding down into Daly's in the cupola you could see that there was no headlight on your engine?

A. Yes.

Q. That engine was then proceeding with the pilot first?

A. Yes.

Q. Was there any light on the tank?

A. No, not at that time, no.

Q. I suppose you got out of the caboose at Daly's.

A. Yes.

Q. To perform the necessary work of putting these cars on the track and run around them.

A. Yes.

Q. And did you get back into the caboose before you left Daly's?

A. Well, you had to—

Q. Did you?

A. Yes. Yes, if that is what you want.

Q. I just want the facts.

A. Yes.

Q. About how long before you left Daly's did you get into the caboose?

A. Maybe five minutes.

Q. Five minutes?

A. I should say. I wouldn't—

Q. At that time was your train laying with the tank first and the engine in reverse?

A. Yes.

Q. When you got on the caboose at Daly's?

A. Yes. Yes. That's right.

[fol. 275] Q. It was lying out on this track toward State Line?

A. Yes. Yes. That's right.

Q. Where had you been before you got into the caboose.

A. Do you mean at Daly's?

Q. Yes.

A. You had to go in and call at the dispatcher's and call at the dispatcher's.

Q. You did that?

A. You had to do that.

Q. After you did that you went into the caboose and you waited about five minutes?

A. Yes, that's right.

Q. As to this dispatcher's place that you went into, was that to the rear of the caboose?

A. No. It is a little shanty.

Q. How near to the caboose was it?

A. It wasn't far from the caboose. Right near the caboose. About as this desk here (indicating).

Q. Right alongside it?

A. Yes.

Q. It wasn't near the head end of your engine?

A. No.

Q. It wasn't near the head end of your tank?

A. Yes.

Q. You came right out of the shanty and got into the caboose and sat down?

A. Yes.

Q. Did you?

A. Yes, that's right.

Q. Did you go immediately into the shanty or did you do a little writing first?

A. I did a little writing first.

Q. You were down in the lower part of the caboose?

A. I did a little writing first.

Q. Were you still writing when you left Daly's?

A. No. Leaving Daly's I was in the caboose resting.

Q. Did you get out of the caboose after you had gotten through?

A. Oh no.

Q. Where was your flagman and brakeman during that time?

A. One of them was sitting up in the cupola.

Q. At that time you were working on your papers?

A. Yes.

Q. Where was the other?

A. Another fellow was down on what we call downstairs.

[fol. 276] Q. Sitting in one of the seats downstairs?

A. Yes.

Q. When you got up in the cupola which seat were you riding on as you were going to proceed forward? Which side?

A. Left side.

Q. The left side?

A. Yes.

Q. Was that on the side where the accident happened or on the other side?

A. On the other side.

Q. The opposite side?

A. Yes.

Q. As you sat up—

Mr. Allen: You have not got a picture of the caboose, have you, Mr. Brumley?

Mr. Brumley: No, I guess not.

Q. As you sat up in the caboose in the cupola the nose or the pilot of your engine was right towards you, wasn't it?

A. Yes, that's right.

Q. And as you sat there you were looking right into the short end of that caboose.

A. That's right.

Q. Or rather that engine.

A. Yes.

Q. When did you see the light on that tender lighted?

A. Why, they was lighting it at Daly's when I was in the office there calling up.

Q. What?

A. They lit it at Daly's.

Q. While you were in the office?

A. Yes.

Q. And you went right into the caboose?

A. Well, when you came right out you could see the light was lit.

Q. So it was lighted?

A. Yes.

Q. As you sat up there in the cupola the headlight of the engine on the pilot was right in front of you, wasn't it?

A. Yes.

Q. And you say it was not lighted?

A. No.

Q. It was not lighted at any time?

A. It would blind you in the caboose.

Q. What?

A. It would blind you in the caboose if that was lit.

[fol. 277] Mr. Allen: Just a minute. I move that that be stricken out.

The Court: Strike it out.

Q. It was not lighted at any time from the time you left Daly's until after this accident happened, until this accident happened, was it?

A. Yes. The back-up light was on.

Q. I mean the light on the front of that engine.

A. No. No.

Q. When had that light been turned out?

A. Turned out? What do you mean, turned out?

Q. Didn't you say you had it on from Pittsfield?

A. No.

Q. You didn't!

A. No.

Q. It hadn't been on that night at all?

A. No.

Q. As you proceeded from Daly's to West Stockbridge you say it is about 7 miles, do you?

A. Yes, I should say so. Yes.

Q. And does that mean up to the town crossing at West Stockbridge?

A. No. I would call it up to Elkey's Crossing seven miles. I would call it nine miles from Daly's to State Line.

Q. And about how far is it from Daly's to the first crossing in West Stockbridge known as the "town crossing"?

A. Well, I should say six and a fraction, yes.

Q. So it is about a mile between the town crossing and the Elkey Buckley's Crossing?

A. Yes.

Q. As I understand it as you come to the town crossing you are making a curve, aren't you, across town?

A. Yes, there is a curve there.

Q. That is a curve coming from Daly's to the left, is it?

A. Yes.

Q. And then you run parallel to the highway, don't you, for some distance?

A. Yes: Yes.

[fol. 278] Q. And then you make another turn right to the left?

A. Yes, that's right.

Q. So the track makes practically a loop there, doesn't it?

A. Yes: Yes.

Q. As you came to this town crossing were you seated alone in the cupola or was one of the brakemen with you then?

A. Yes, one of the brakemen was there with me.

Q. Which one was it?

A. Lawless (indicating).

Q. Lawless?

A. Lawless.

Q. Is there any whistling post at that crossing?

A. Yes.

Q. How many feet from that crossing is that whistling post?

A. About 300 feet.

Q. How fast were you going when you came to the town crossing?

A. Oh, I should say 15 miles an hour.

Q. That is your best judgment?

A. Yes.

Q. Did you hear any whistles blown for that crossing?

A. Yes, sir.

Q. How many were blown there?

A. Two long and two short repeated.

Q. Eight whistles were blown at the town crossing too?

A. Yes. Yes.

Q. That is the usual practice, to give eight whistles.

A. Yes. Yes.

Q. You blow the long ones first, don't you?

A. Two longs first.

Q. How many seconds since that first long one?

A. Why, I never timed them.

Q. About how much longer is the long one from the short one in time?

A. Not too much.

Q. Is there an interval between the first and second long one?

A. Yes, a little.

Q. Then there is an interval between that and the two short ones.

A. Yes.

Q. How much of an interval is there between the next repeated set?

A. Well, not much, just a little.

[fol. 279] Q. Where was the last signal given then for the town crossing, the last whistle?

A. Practically right up on the crossing.

Q. Did you hear the bell ringing then?

A. Yes.

Q. And where was it started for the town crossing?

A. The bell?

Q. Yes.

A. Quite a ways down below the town crossing.

Q. Was it turned off after you passed the town crossing?

A. I don't think so.

Q. You don't think so?

A. No.

Q. The whistling post for this Elkey Buckley Crossing is about 300 feet from the crossing?

A. That's right.

Q. And you say you repeated the same signal or the same signal was repeated by eight whistles up there?

A. Yes, that's right.

Q. Did you see any automobile?

A. No. I couldn't.

Q. You didn't see any?

A. No, I didn't.

Q. Did you see any automobile coming from your side?

A. No. I didn't.

Q. Did you at any time see an automobile coming down from your side?

A. No. No.

Q. After the accident?

A. Oh yes, certainly.

Q. Didn't you see an automobile come down from your side?

A. Oh, yes, plenty, after the accident, certainly.

Q. What first attracted your attention?

A. To what?

Q. To something having happened?

A. Why, I heard kind of a noise like a thud.

Q. Kind of what?

A. Kind of a thud.

Q. A thud?

A. Yes.

Q. Was it a loud thud?

A. Yes.

Q. Where was the caboose when you heard the loud thud as regards the crossing?

A. Why, it just went by about 100 feet from the crossing.

Q. It just went by about 100 feet from the crossing?

A. When I got there, when we stopped—

Q. Maybe you don't understand me. You say the first thing that attracted your attention was a thud?

A. Yes.

[fol. 280] Q. A loud thud?

A. Yes.

Q. Where was the caboose as regards the crossing when you heard the thud?

A. Just as we got over the crossing.

Q. Just as you got over it?

A. Yes.

Q. Are you sure you mean that?

A. What do you mean? I don't get you.

Q. I want to be sure that you get me. When you use the words "over the crossing", you mean going over the crossing towards State Line, do you?

A. Yes.

Q. And you didn't hear the thud until the caboose, which was the rear end, got over the crossing?

A. No. No. The thud was just before we got over. We hadn't got over the crossing.

Q. Yes, but where was the caboose?

A. The caboose was practically on the crossing at that time.

Q. The caboose?

A. Yes. Yes.

Q. Was on the crossing?

A. Yes.

Q. And it was not until then that you heard the thud?

A. Yes. Yes.

Q. And you afterwards saw that this car was to the right of the road down in a gully up against that post, did you?

A. That's right, yes.

Q. After you heard the thud what next was done as far as you know?

A. Why, the air went on. The brakes went on. We stopped as far as I know.

Q. How many feet did you go beyond the crossing?

A. I should say 100. It might have been a little more.

Q. 150?

A. It might have been.

Q. 200?

A. No.

Q. 150?

A. No, between 100 and 150 I should say.

Q. Going at 15 miles an hour you put on the air?

A. (The witness indicated.)

Q. Is that the best stop you made, 150 feet with only one car?

A. Well, 100 feet I should say. I should say it might have been over.

[fol. 281] Q. What did you do the first thing when your train came to a stop, at once?

A. We went right back to where the automobile was.

Q. What did you do?

A. We looked for the position that the people was and everything.

Q. Did you get out of the caboose?

A. Certainly.

Q. You took a lantern?

A. Yes.

Q. And went back and looked at the condition of the people and the condition of the automobile?

A. Yes. Yes.

Q. Did you help?

A. I tried to help all I could.

Q. You tried to help all you could; is that right?

A. Yes.

Q. Then you went off to get Doctor Persing?

A. Yes.

Q. You knew Doctor Persing?

A. Yes.

Q. You lived in that town?

A. Yes.

Q. So you went right from the scene of the accident to get Doctor Persing?

A. Yes.

Q. How did you get to Doctor Persing?

A. I had a fellow take me.

Q. Who is the fellow?

A. I had a fellow by the name of Sam Bennet drive me down there.

Q. So you first came over to where the people and tried to help them.

A. Yes.

Q. Then you got Sam Bennet from where you were standing and went over to get Doctor Persing.

A. Doctor Persing, yes.

Q. How long were you gone?

A. Not too long.

Q. How long were you gone?

A. I should say ten minutes.

Q. Someone else had got there ahead of you?

A. Yes.

Q. Then did you come back?

A. I came back.

Q. Then considering the time that you went for the doc-

tor and looked at the automobile and the people you didn't get back until fifteen minutes after you got off the caboose?

A. Yes.

[fol. 282] Q. Then did you stay around there and help?

A. Yes.

Q. How long?

A. Why, we stayed around there until about 6:45.

Q. Who moved your train?

A. The engineer.

Q. When was it, when you got back from Doctor Persing?

A. Oh no, we didn't move from the time we stopped.

Q. Was it moved when you came back from Doctor Persing?

A. Oh no, it was right there where it was.

Q. When was it that you made this inspection that you told Mr. Brumley about?

A. Of the engine?

Q. Yes, sir.

A. When I came back from Doctor Persing there.

Q. Fifteen minutes or more after the accident?

A. Yes. Yes.

Q. And that is when you say you went up and looked to see whether the light was on the front?

A. Yes.

Q. You don't know who had been up there before, do you?

A. No.

Q. During that fifteen minutes?

A. No. No.

Q. No, and was it then that you say you looked at the steps?

A. Yes.

Q. After you had come back from Doctor Persing?

A. Yes.

Q. Then when you came back from Doctor Persing you didn't stand around and help these people immediately, did you?

A. I done what I could, yes.

Q. How long were you helping them before you went to the head of the train?

A. Well, hardly ten—fifteen minutes.

Q. So it was at least a half hour before you made this inspection?

A. Yes.

Q. When you say the light was burning; is that right?

A. Yes, the light was burning.

Q. And how long after that did you move it up the track out of sight?

A. Oh, we left there at 5:45 and we got there at 6:10.

[fol. 283] Q. Didn't you stay there until the people were taken away?

A. Yes, certainly.

Q. As this picture, Exhibit F, shows this engine is the side that was to the right as you were proceeding shown in the picture or is the other side? Do you know what I mean?

A. What do you mean?

Q. Which way was that engine moving on the night that this accident happened, backing up?

A. Backing up.

Q. Backing up?

A. Yes.

Q. Is this the side?

A. This side right here, yes (indicating).

Q. Is this the side opposite the side on which you were sitting?

A. That's right.

Mr. Brumley: Do you mean the side shown in the picture?

Mr. Allen: Yes, the side shown in the picture.

Q. Can you tell me about how high the caboose is?

A. From the ground?

Q. Yes, from the rail.

A. About 3 feet I should say.

Q. No, I don't think you get me. The top of the caboose.

A. Oh, up at the top?

Q. Yes.

A. Oh, I should say 10 to 12 feet.

Q. Is it as high as the engine or higher?

A. Yes.

Q. Did it go up to the smokestack or did it go above the engine?

A. Yes, up to the smokestack.

Q. I believe you say that the rear step you noticed was bent.

A. Yes.

Q. Which way was it bent?

A. It was bent right toward the engine.

Q. Toward the engine?

A. Yes.

Q. How many steps are there?

A. One.

Q. Was it the bottom that was bent?

A. Yes.

Q. The lower step?

A. Yes.

Q. I thought it looked like two. Isn't that two steps (indicating)?

A. No, it was only one step there. I never seen an engine with two yet.

Q. Maybe we all call the same thing a step. Just above that X is a step, isn't there?

A. There is a step right there. That is the only step there is (indicating).

Q. What is that thing here (indicating)?

A. That is a wheel.

Q. Just look at this (indicating).

A. Yes, that is a double step, yes.

Q. It is a double step?

A. Yes.

Q. And it was only the bottom step that was bent in a little; is that right?

A. Yes, that's right.

Q. You don't know whether that step was bent in a little before, do you?

A. I don't think it was. It might have been.

Q. Did you say in answer to Mr. Brumley's question that the bell was ringing after the accident had happened?

A. I think it was.

The Court: He said he thought it was.

The Witness: I don't think he ever shut it off.

Q. Was it still ringing after you passed by looking for Doctor Persing?

A. No. Somebody had shut it off.

Q. Somebody had turned it off from the engine?

A. Yes. I think so.

Q. It was not going?

A. No.

Q. You say that was just operated by a little lever in the cab?

A. Yes. Yes.

Q. And you say also the light that was on the tender was also operated from a little lever there?

A. Yes.

Q. Was that right near the bell? Were they right near each other?

A. Yes.

Q. Right alongside each other?

A. Yes.

Q. You don't remember whether or not the bell had stopped ringing before you went to get Doctor Persing?

A. No. I don't.

[fol. 285] Q. But you do know that when you came back in fifteen minutes it had stopped then.

A. Yes.

Q. Did anyone come down from the caboose with you?

A. Yes.

Q. Who?

A. The flagman and brakeman.

Q. Did anyone else come off the train?

A. The engineer and the fireman came back naturally, or the fireman stayed on the engine and the engineer came back.

Q. So the fireman remained on the engine?

A. Yes.

Q. And he didn't come back to the scene where you were?

A. Not at that time, no.

Q. During the time that you were there before you went to Doctor Persing?

A. Yes.

Q. Is that right?

A. That's right.

Q. When you came back from Doctor Persing he was still up in the engine?

A. I suppose so.

Q. You didn't see him around?

A. No.

Q. Did the engineer come back?

A. Yes. He came back.

Q. (Continuing): —to the scene of the accident when you came back from Doctor Persing?

A. Yes. Yes.

Q. Do you know where your brakemen went?

A. They were back there helping.

Q. You didn't see the fireman there at all.

A. No. I didn't. He might have been there. I didn't see him.

Q. As to this cupola that you sit in—

A. Yes.

Q. It does not extend all the way out to the sides of the caboose, does it?

A. No. No.

Q. Is that a sort of rectangular compartment on top?

A. Yes. It is right up in the center of the caboose, yes.

Q. And from the side where you were sitting up there to the edge of the caboose how many feet is it?

A. What, that caboose?

Q. From the side of the cupola, which is above the roof of the caboose, isn't it?

A. Yes.

Q. From the side of the cupola over to the side of the caboose how many feet is it?

A. Oh, maybe three feet.

[fol. 286] Q. Is it 3 feet on each side, is it?

A. Yes, I should say.

Q. The floor of the caboose is lower than the roof of the cab?

A. Yes, that's right.

Q. Quite a little down, isn't it?

A. Yes, that's right.

Q. So when you are up in there you are only about 2 feet higher than the roof of the cab.

A. Yes, just about.

Q. Just about that, isn't it?

A. Yes.

Q. The cab of the engine is about how high from the rails?

A. Oh, I should say 3 feet there.

Q. Oh, no. No. The top of the cab from the rails.

A. Oh, that is probably 10 to 12 feet, isn't it?

Q. 10 to 12 feet, isn't that right?

A. Yes.

Q. And that is higher than the roof of the caboose?

A. Yes.

Q. And so is the tank higher than the roof of the caboose?

A. Yes, you are right.

Q. And it is even higher than the cupola, isn't it?

A. Yes.

Q. As you were sitting there in the seat three feet in from the side of the caboose you couldn't look out to see the head of your train, could you?

A. You can, yes. That is what the caboose is for, to look out.

Q. You have to reach way out the side of that train.

A. Yes, you have to look out the side of the window. That is what them cupolas are for.

Q. But they usually do not have the caboose on the pilot end of the engine, do they?

A. Not in every case.

Q. Do they?

A. Not in every case.

Q. That is where you have the caboose on the rear end of the train where the cupola is higher than the front cars; is that right?

A. Yes.

Q. But when you have the caboose at the pilot end of the train the cupola is below the top of the tank.

A. That is where they got the side windows to look out.

Q. You can look out straight across?

A. When you are going around a curve you can look out. That is what they are for.

[fol. 287] Q. When did you look out to see this light that you speak of?

A. Well, I live right there where the whistling post is. I got off of the cupola. I waved at the house. I got out to the tail end.

Q. What is that?

A. I waved at the house. I got out to the tail end.

Q. You got out to the tail end?

A. Yes.

Q. You got out and looked to the back but then you were not looking to see whether the light was on the rear end of the train, were you?

A. All you had to do was to look out.

Q. When you came out and waved you were on the rear end of this cupola out on the platform.

A. Yes.

Q. You were out, weren't you?

A. On the side.

Q. Did you get out to the edge?

A. Yes.

Q. Then you looked around the edge of the bank to see?

A. Yes. You could see very easy.

Q. Your house is on which side of the track?

A. On the left side.

Q. As you were proceeding?

A. Yes.

Q. And the pond is on the opposite side, is it?

A. Yes, there is a pond on both sides.

Q. A pond on both sides?

A. Yes.

Q. Isn't your house about 400 feet back from the whistling post?

A. Yes, on the—

Q. So that would make it about seven or eight hundred feet away from this crossing.

A. That's right.

Q. That would be before you commenced to make this turn, wouldn't it?

A. You make that turn right in front of our house.

Q. Seven or eight hundred feet from the crossing where the accident occurred is before you enter the turn.

A. Yes.

Q. So you had been proceeding straight ahead when you got on the platform?

A. Yes.

Q. And at that time when you were looking at your house [fol. 288] you had to look backwards from the way you had been coming?

A. That's right, yes.

The Court: Down to that crossing, after you passed that curve going the way you were going how large or how long a stretch of track was it before you got to the crossing?

The Witness: Elkey Crossing?

The Court: Yes.

The Witness: Oh, you go right up and curve. You curve right back of the Catholic church.

The Court: How many feet of straight travel is there before you come to the Catholic church?

The Witness: Not too much.

The Court: How much?

The Witness: I should say about five or six car-lengths.

The Court: How many feet?

The Witness: 40 foot to a car. That would be about 200.

The Court: In other words if you stood at the Elkey Buckley Crossing, as you say, and looked the way your train was coming you could see a clear track for 200 feet?

The Witness: Yes, easy.

Q. And then the curve commenced and you couldn't see; is that right?

A. Yes.

Mr. Brumley: You couldn't see what, did you say?

Q. You couldn't see up to the crossing when you were 200 feet away from it.

A. Oh, on the left side you can look.

Q. On the side you were riding?

[fol. 289] The Court: You are not going anywhere.

Q. On the side you were riding? That is the left turn.

A. Coming right up to the church you can see up to the crossing.

The Court: No. No. That is not what he asked you.

The Witness: He is asking me about the crossing.

Q. It is only 200 feet away from the crossing.

A. Yes. That is what I am telling him, about.

The Court: All right; is that all, gentlemen?

Mr. Allen: That is all.

The Court: Is that all, Mr. Brumley?

Mr. Brumley: Well, I had a few questions.

The Court: But no re-direct that you have covered. I am going to hold you gentlemen strictly to it. You are going to get one shot at this, both of you.

Mr. Brumley: I appreciate that.

The Court: And nothing that you have gone over already.

Redirect examination.

By Mr. Brumley:

Q. I think it was mentioned on cross examination about the movement of the train after the accident. The train

came to a stop after the accident about 100 feet or some little more from the crossing?

A. Yes, that's right.

Q. When you got back from the doctor's was that train in the same position?

A. In the same place.

Q. How long after the accident was it that the train was moved at all?

A. Well, we got to the Elkey Crossing at 6:10 and we left at 6:45. That is thirty minutes.

Q. So the train was standing still between 6:10 and 6:45; is that right?

A. That's right.

[fol. 290] Q. Sitting in the cupola and looking either to the side or forward that night were you able to see the headlights on the tender?

A. I could.

Mr. Allen: I object and ask that the answer be stricken out.

The Court: Strike it out. That has been covered.

Mr. Allen: He has testified on direct and cross both.

Q. Did you see it?

A. Yes, I did, Mr. Brumley.

Q. When you got down on the rear end of the caboose, as you passed your house did you or did you not see the headlight of the tender?

A. Yes. I did. I could see the light. I couldn't see the headlight. I could see the light.

Mr. Allen: I move to strike that out.

The Court: Strike it out.

Q. Did you see the light?

A. I couldn't see the light.

Q. Did you—

The Court: What you mean is that you could see the light on the track, that you couldn't see the light itself.

The Witness: No, I couldn't see the light itself.

Q. But did you see that it was lighted?

A. Yes. Certainly.

Q. You were asked by Mr. Allen the distance of the

whistling post from the town crossing, approaching the town crossing. What did you say about that?

The Court: 300 feet.

A. 300.

The Court: I suppose they are all set at about 300 feet.
[fol. 291] The Witness: That is what they are supposed to be.

The Court: The whistling posts are set at 300 feet from crossings.

Q. Do you know the distance?

A. No. I don't.

Q. Did you ever measure it?

A. No. I didn't.

The Court: That is his judgment.

Mr. Brumley: We will bring that up. That is all.

The Court: That is all. Step down.

Mr. Brumley, may I ask this? How many more witnesses are you going to call in the case? I don't mean to be personal. I want to see about the next cases.

Mr. Brumley: I should say a total of twelve.

The Court: All right, Monday, gentlemen. The jurors at the back of the courtroom are excused until Monday. I will take one more witness now, if I can.

CATHERINE VERONICA JOHNSON, called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

The Court: Where do you live?

The Witness: West Stockbridge, Massachusetts.

Direct examination.

By Mr. Brumley:

Q. Miss Johnson, you are the sister of Conductor Johnson who just testified.

A. Yes, sir.

[fol. 292] Q. And you live with him in West Stockbridge?

A. Yes, sir.

Q. You will have to speak up so that I can hear back here and then all the jurors can hear you.

A. Yes, sir.

Q. How long have you lived in that house with him?

A. All my life.

Q. How far is that house from the Elkey Crossing?

A. About 300 feet.

Q. About how far?

A. Between 200 and 300 feet, I am not sure.

Q. Is it on the same side of the road as the Catholic church?

A. Yes, sir.

Q. And is it farther away from the crossing than the Catholic church?

A. Yes, it is below the Catholic church.

Q. How many houses are there between your house and the Catholic church, do you know?

A. Two houses.

Q. Two houses?

A. Yes.

Q. And does the back of your house face upon the railroad track as it goes around the curve?

A. That's right.

Q. And how far is your house from the railroad track at that point, about how far?

A. Oh, about 200 feet, I should say.

Q. On the night of December 25th last year were you in your house?

A. Yes, sir. I was resting, waiting.

Q. Where in your house were you?

A. I was in the front bedroom facing the road, facing the state road.

Q. And about what time was that?

A. Well, I went upstairs—at the time of the accident?

Q. You went upstairs when?

A. Around 3:30.

Q. And what did you do?

A. I was resting, waiting for the train to come.

Q. Did you go to sleep?

A. Yes, I did.

Q. And tell us then what happened.

A. Well, I was asleep; I had to meet the train. I took my brother to State Line that morning, and I was waiting

[fol. 293] to go up to meet him and I didn't hear—when I heard the whistle blow at the whistling post near the Catholic church I was fully dressed except for my shoes, and I got up, and the whistle was still blowing when I got my shoes on, and I went to the hallway. In the meantime my brother came to the bottom of the stairs.

Q. Was your brother in the house with you?

A. My other brother was downstairs at the time.

Q. Yes, and what did you do, stay in the house?

A. Yes. He told me he was going.

Q. You cannot say what he said but did your brother go up to State Line?

A. Yes, he went to State Line and I stayed in the house.

Q. You had planned to go to State Line, had you?

A. Yes. I did.

Q. Had you done that before?

A. Yes. I had done it always.

Mr. Allen: I object to what she had done before, your Honor.

The Court: Yes.

Q. About what time was it that you heard the whistle?

A. Oh, about 6:10.

Q. From where you were in your room could you see the train?

A. No. I couldn't.

Q. You were facing the street?

A. I was facing the street.

Mr. Brumley: That's all. Oh, no, I have one more question.

Q. Do you work in Massachusetts in West Stockbridge, Miss Johnson?

A. Yes, sir, I work in the post office.

Q. What is your position there?

A. Post office clerk.

[fol. 294] Q. Under whom do you work?

A. Under John Troy.

Mr. Brumley: All right.

Cross-examination.

By Mr. Allen:

Q. Miss Johnson, has that street that you live on got a name?

A. Albany Road.

Q. Albany Road, and that is the street that the Catholic church is on there?

A. Yes, sir.

Q. Do you live on the same side of the street as the Catholic church?

A. Yes. I do.

Q. You live between the Catholic church and the town crossing or the Catholic church and the Elkey Buckley Crossing, which?

A. Well, my house is between the town crossing and the Catholic church.

The Court: You are further from the Buckley Crossing than the Catholic church is; is that right?

The Witness: Yes.

Q. About how much farther toward the town crossing than the Catholic church is your house, how many feet, several hundred?

A. Yes.

Q. In fact it is up fairly close to the town crossing, isn't it?

A. Well, it is beyond the town crossing. It is about 200—

Q. How far is it from the town crossing?

A. About 200 feet.

Q. Yes, about 200 feet from the town crossing?

A. Yes.

Q. And that is quite a distance from the Elkey Buckley Crossing?

A. Yes. Yes.

Q. Have you an automobile?

A. My brother's automobile.

[fol. 295] Q. Weren't you out in an automobile that afternoon?

A. No. I was not.

Q. Not at all?

A. No.

Q. What time did you say you lay down to take a rest?

A. About 3:30.

Q. Was anyone else in the house at that time?

A. Yes, my sister and brother were there.

Q. And you were in the room in the front part of the house facing Albany Street?

A. Yes.

Q. And then you went to sleep?

A. Yes.

Q. Had you been out in the morning with the automobile?

A. I went to work that morning.

Q. You went to work that morning?

A. Yes.

Q. After that did you take any ride in the automobile?

A. No. I didn't. I went to State Line that morning and I drove home and drove to work, that's all.

Q. Did you go sound asleep?

A. Yes. I did.

Q. And you slept, you say, until you heard a whistle.

A. Yes, sir.

Q. How many whistles did you hear?

A. Well, I don't know the number but I know it was a loud one.

Q. Louder than usual?

A. Well, it was loud. It seemed to have been. It must have been loud to awaken me.

Q. It was louder than you usually hear; is that it?

A. Well, I wouldn't say that because I was waiting for it; it seemed louder.

Q. Was it?

A. It seemed like a long one.

Q. Did you hear any whistles after that long one?

A. Well, it seemed like one long one.

Q. Is that all?

A. Yes.

Q. You say that was 6:10.

A. Yes, sir.

Q. Did you look at the clock?

A. No, I didn't, but I heard after the accident was around that time and it was when the accident happened.

Q. You heard afterward about the accident; is that right.

A. Yes.

[fol. 296] Q. That is why you fix the time when you heard the whistle? Someone told you when the accident happened?

A. Well; my brother left the house to go to State Line and I know he left a little after six.

Q. Your brother?

A. Yes.

Q. He left to go to State Line before you heard the whistle?

A. After I heard the whistle.

Q. How long after your brother left to go to State Line did you hear this whistle?

A. Immediately after.

Q. Five minutes?

A. Well, maybe not five—between three and five.

Q. You were still lying in bed then?

A. No. I had got up to go to the hall, and he told me he was going, so I went back to my bed.

Q. Then it was later that someone told you that it was at 6:10 that the accident happened; is that right?

A. No, it was later than that. The accident happened, I assume, it was 6:10, when I heard the whistle.

Q. It was after 6:10 when it happened?

A. Yes.

Q. From whom did you learn it?

A. I don't know.

Q. Miss Johnson, did you hear any bell?

A. No, I couldn't say I heard the bell. I heard the whistle, that's all.

The Court: If you are 200 feet from the town crossing you must be more than 4,000 feet from the Buckley Crossing; is that right?

The Witness: I couldn't say.

The Court: You are quite a distance, aren't you?

The Witness: Yes.

The Court: Half a mile?

The Witness: Oh, no.

The Court: No, it is only a mile from the town crossing.

The Witness: No, it is only a mile from the town crossing to the Buckley Crossing.

[fol. 297] The Court: All right. You say you are nearer to the town crossing; is that right? Is your house closer to the town crossing than the Buckley Crossing?

The Witness: I think it is closer to the Buckley Crossing.

The Court: About half way we will say?

The Witness: Yes, or a little more than that.

Q. Miss Johnson, you understood the question the Court asked you, did you?

A. Yes.

Q. Did you understand the questions I asked you?

A. Yes.

Q. You understood mine just as well as what the Court asked you.

A. Well, at the time I didn't realize—

The Court: I am going to start to make a little time now. I don't think this witness's testimony is very valuable. Why waste a half hour on it? This girl got up out of her sleep. She said she heard a whistle. She does not know what time it was except what somebody told her after. I am trying to say that I am not going to permit one-half hour to be spent on that.

Mr. Allen: I am through with her, your Honor.

The Court: Are you through with this witness?

Mr. Allen: That is right.

By Mr. Brumley:

Q. Is the whistling post for the Buckley Crossing immediately back of your house?

A. Yes.

Mr. Brumley: That's all.

The Court: That's all, step down.

[fol. 298] JAMES RAYMOND LAWLESS, called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

Direct examination.

By Mr. Brumley:

Q. Mr. Lawless, where do you live?

A. Danbury, Connecticut.

Q. On December 25, 1940, were you the brakeman on Extra 438?

A. Yes, sir.

Q. How long have you been employed by the New Haven Railroad?

A. Approximately two years.

Q. And on that night what time did you leave Daly's?

A. 5:40 P. M.

Q. And where did you get on the train when you left Daly's? What I mean by that did you get on the engine or the caboose or the tank?

A. On the caboose.

Q. And were you in the caboose from Daly's to the place of the accident?

A. Yes, sir.

Q. What part of the caboose were you in?

A. Right-hand end of the caboose, in other words, the trailing end of the caboose, in other words, where the desk was.

Q. I show you this Defendant's Exhibit F. Do you know whether or not before leaving Daly's the headlight on the tender of the engine was lighted?

A. It was lit, sir.

Q. Did you see it?

A. Yes, sir.

Q. From where you were in the caboose riding, up to Elkey's or Buckley's Crossing, did you see at any time whether the headlight on the tender was lighted?

A. Yes, sir.

Q. What was the speed of the train going toward that crossing?

A. Approximately 15 miles per hour.

Q. Approaching the crossing did you hear any bell or whistle?

A. Yes, sir.

Q. What did you hear?

A. I heard the bell ringing, and a whistle signal—two longs and two shorts prolonged.

[fol. 299] Q. When did that whistle end?

A. I should say right over the crossing. Prolonged, in other words, would be prolonged over the crossing.

Q. Did you feel a bump?

A. No, sir.

Q. At all?

A. No, sir.

Q. From where you were?

A. No, sir.

Q. Did you feel any brakes go on?

A. Yes, sir.

Q. What did you feel as to brakes?

A. Well, I felt the sudden jerk as the train goes into emergency.

Q. And where was the caboose when the brakes went into emergency?

A. I should say the part of the caboose going north, railroad direction, would be just about coming on the crossing.

Q. Do you know about what time of the day it was that the accident occurred?

A. 6:10 P. M.

Q. Your train came to a stop I suppose.

A. Yes.

Q. About how far north of the crossing was your caboose when it came to a stop?

A. Oh, about 100 feet.

Q. And when it was moved after the accident was it moved up to State Line, the train, I mean.

A. After the accident?

Q. Yes, after the accident the train went to State Line, did it?

A. Yes, sir.

Q. And how long after the accident was it before the train was moved?

A. 6:45 P. M.

Q. After the accident what did you do?

A. Do you mean right after?

Q. I mean your train came to a stop and you were in the caboose. What did you do?

A. I took my light and proceeded back to the scene of the accident, and then I looked at the — and saw the occupants in there. They were badly hurt, and then I knew they needed medical assistance, so I went and looked out on the road for a car coming, and inside of, oh, perhaps a half a minute I seen one coming from West Stockbridge towards Pittsfield, and he slowed down, and I stopped him, [fol. 300] and I asked if he would please go find a doctor. Then he left, and then I went back to the car again. By that

time another car had come from the other direction and they hopped out—I believe there were two of them—and they went out of the car and they started to help a woman or endeavor to get the woman out of the car; but a few seconds after that they were making progress getting her out, so I went to the caboose and got a stretcher, and by the time I got back with the stretcher they had the lady out of the car and set it down; and then the procedure went over toward the man, and they finally got him out of the car.

Q. Did you notice at any time after the accident whether the headlight was burning on the tender towards State Line?

A. No, sir.

Q. You didn't notice it?

A. No, sir.

Q. Was there any time after the accident when the headlight of the engine pointing toward the crossing was turned off?

A. Yes, sir.

Q. How soon after the accident was that?

A. I should say just before the train came to a stop the engineer flicked the headlights on so we could see back—

Mr. Allen: I move that "so we could see" be stricken out.
The Court: Strike it out.

Q. He put the headlight on; is that right?

A. Yes, sir.

The Court: Then after he put the headlight on could you see back to the crossing?

The Witness: Yes, sir.

Q. After the accident did you at any time examine the tender and engine?

A. Yes, sir.

Q. What did you find out?

A. Well, that step on the tender was bent to a slight degree. It was bent in. It would be hard to explain, just pushed in at a slight angle; I should say something like that (indicating).

Q. Was that step marked in this Defendants' Exhibit F? Is the step marked "BX"?

A. Yes, sir.

Q. That step has two rungs to it, has it?

A. That's right, sir.

Q. Did you observe anything else on the engine or tender?

A. Well, the steps climbing up to the cab were ripped off on the firemen's side.

Q. When did you observe the condition of the step on the end of the tender and when did you observe the condition of the step on the caboose?

A. Just before we were ready to leave for State Line after everything had been taken care of at the accident. Before we left I looked at the engine and I happened to be up in the cab talking to the fireman and he warned me to be careful.

Q. No, never mind what he said to you, just what did you do?

A. When I looked out I seen there was no steps, so therefore I couldn't get off on that side because that is what I had in mind.

Q. So you got off the other side, did you?

A. That's right.

Mr. Brumley: That's all.

Cross-examination.

By Mr. Allen:

Q. Mr. Lawless, you were riding in the lower part of the caboose all the way from Daly's over to the place where this accident happened?

A. Yes, sir.

Q. Were you working there at the desk doing anything?

A. Not at the desk. At that particular point of the accident to the best of my recollection I was taking care of the fire and I had to be back for the following day.

Q. You were taking care of that job?

A. Yes.

[fol. 302] Q. You had been working there at your desk at some papers, had you?

A. I had been sitting down. At the desk there was one wooden seat and perhaps four people—

Q. Before the accident you were taking care of the fire that is in the caboose.

A. That's right.

Q. And when before you got into the caboose had you seen any light on the tender?

A. Yes, sir.

Q. When?

A. At Daly's.

Q. How long before you got into the caboose?

A. Do you mean at Daly's?

Q. Yes. That is the first place you say you saw the light, isn't it?

A. That's right, sir. What is your question please, now?

Q. How long before you got into the caboose did you see the light on the tender?

A. Oh, I should say six minutes.

Q. And then you went in and sat down; is that right?

A. That's right.

Q. And attended to whatever work you had to do?

A. That's right.

Q. You say that there was a whistle—two long and two shorts prolonged—is that right?

A. That is right.

Q. It was not two long and two shorts and then two longs again and two more shorts, was it?

A. Yes.

Q. Which was it, now?

A. It was two longs and two shorts at the whistling post, and then it proceeded again two longs and two shorts, which by "prolonged" I mean that last short will be dragged out until the train was over the crossing.

Q. So then you had eight whistles? You did hear eight whistles too?

A. Yes, sir.

Q. When you use the word "prolonged" you don't mean that the last one and the first one was prolonged.

A. Well, just the last short whistle was prolonged coming to the crossing.

[fol. 303] Q. Was that four, first set of four?

A. No.

Q. There were two sets?

A. Yes.

Q. You remember that?

A. Yes, sir.

Q. You told him that there were two longs and two shorts prolonged.

A. Yes, sir.

Q. That is the reason why I asked you these questions, is that right?

A. Yes, sir.

Q. You don't know where they started to blow that whistle, do you?

A. At the whistling post.

Q. Did you look out to see?

A. No, sir.

Q. So you are just guessing at it.

A. I am not guessing. I have been over that road.

Q. Have you talked this over with the other members of the crew, with Mr. Johnson?

A. Have I discussed the accident with them?

Q. Yes, about the whistles and where they were blown and so forth.

A. Yes.

Q. Who fixed the time of 6:10?

A. I don't know what you mean by "fixed".

Q. What made you say it was 6:10?

A. I looked at my watch.

Q. And did you tell the others the time?

A. Oh, no, I did not.

Q. Immediately when you came to a stop did you get out?

A. Yes, sir.

Q. Were you the first one out?

A. No, sir.

Q. Who was the first one?

A. Mr. Cook.

Q. The other brakeman?

A. The flagman.

Q. I see, the flagman, and he went down first, did he?

A. Yes, sir.

Q. And you were after him?

A. Yes, sir.

Q. And the conductor was after you?

A. I couldn't say, actually. I would not say on that. I wouldn't answer that.

Q. Did you hear any thump?

A. No, sir.

[fol. 304] Q. Had the headlight of the engine, the pilot, been on there before you got off the caboose?

A. Yes, sir.

Q. When you went back you saw this wrecked automobile?

A. Yes, sir.

Q. And there was a car stopped there across the road?

A. No, sir.

Q. Weren't there some men working when you got back there?

A. No, sir.

Q. How far down the road was your train?

A. 100 feet.

Q. And did you run up?

A. Yes, sir.

Q. How soon after you got there do you say this automobile came up, about a second, do you say?

A. Why, at least a half minute.

Q. A half minute, and did you go away then?

A. What do you mean "go away"?

Q. To look for a doctor?

A. When the car arrived?

Q. Yes.

A. I didn't leave the crossing. I didn't leave the crossing. As I testified to Mr. Brumley, a car came along and I sent him for a doctor.

Q. You didn't leave the crossing? You didn't go in the car?

A. No. No, sir.

Q. That was not the first car that came along.

A. That would be the second.

Q. The second coming from the same side that this wrecked automobile was on?

A. No, sir.

Q. Coming from the opposite side?

A. Yes, sir.

Q. Do you know who that person was?

A. No, sir.

Q. Of course, while you were sitting in the caboose up until the time the brakes went on you had not seen the headlight of the engine, on the tank at any time, had you?

A. Not to my recollection.

Mr. Allen: That is all.

The Court: That is all. Is there any more?

Mr. Brumley: No more from this witness.

[fol. 26] The Court: Have you got a short witness now? Do you want Leo Johnson called?

Mr. Brumley: I understand he is over in New York.

The Court: All right.

Mr. Brumley: I have Mr. Cook. I think Mr. Cook will be short on direct.

ALLEN ELLISON COOK, called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

Direct examination.

By Mr. Brumley:

Q. Mr. Cook, where do you live?

A. New Haven.

Q. How long have you worked for the New Haven Railroad?

A. Twenty-one years.

Q. Were you a flagman on this Extra 438 on December 23, 1940?

A. Yes, sir.

Q. And are you a qualified conductor?

A. Yes, sir.

Q. And had you been on this territory for any length of time and prior to the date of this accident?

A. Well, about six or seven years I was up there.

Q. And you were the flagman?

A. Yes, sir.

Q. What time did you start to work that day?

A. 8:30, I believe.

Q. And the accident happened at about what time?

A. At about 6:10.

Q. What time did you leave Daly's?

A. 5:40.

Q. And when you left Daly's where did you board the train, what part of the train?

A. The caboose.

Q. And were you in any part of the caboose? In what part of the caboose did you ride from Daly's up to the place of the accident?

A. From the desk on the floor.

The Court: Were you with this last witness, Lawless?

[fol. 306] The Witness: Yes, sir.

The Court: In the same part of the caboose with him?

The Witness: Yes, sir.

Q. Did you notice before you left Daly's whether or not there was a headlight on the tender?

A. Yes, sir, there was.

Q. Was it lighted?

A. Yes, sir.

Q. Going between Daly's and the place of the accident did you notice at any time whether the headlight was shining?

A. I did not.

Q. After the accident did you notice whether the headlight was lighted on the tender?

A. I did not.

Q. After the accident did you notice whether the headlight was turned on the locomotive?

A. Yes, sir, it was.

Q. Shining down toward the crossing?

A. Down—

The Court: I beg your pardon?

The Witness: Down south.

Q. Down south?

A. Yes.

Q. Your train moved in a general northerly direction towards State Line; is that right?

A. That is right.

Q. In approaching this crossing did you hear any whistling?

A. Yes, sir.

Q. What did you hear?

A. Two longs and two shorts.

Q. Do you know where that whistle started?

A. That whistle started, I would say, about the whistling post.

Q. Did you see the whistling post at all that night?

A. No, sir. I didn't.

Q. Did you hear two long and two short whistles repeated?

A. Yes, sir. I did.

Q. Did you feel any thump or thud at the crossing?

A. No.

Q. Do you know where your caboose was with reference [fol. 307] to the crossing when the last whistle sounded?

A. It was just about on the crossing.

Q. Did you hear any bell approaching that crossing?

A. Yes, sir.

Q. When did you first notice that a bell was ringing?

A. In West Stockbridge.

Q. And did you hear any bell ringing after the accident?

A. No, sir.

Q. What was the speed of the train approaching the crossing?

A. I should say about fifteen.

Q. Did you feel any brakes go on?

A. Yes.

Q. Where was the caboose when you felt the brakes go on?

A. About to the crossing.

Q. Did you notice the position of the automobile after the accident?

A. Yes, sir.

Q. About how far north of the crossing was it?

A. 30 feet.

Q. And was it turned over?

A. No. It was on the side of the bank.

Q. How far was that, would you say, on a dark night that that headlight on the tender showed ahead?

A. 900 feet.

Mr. Allen: I object.

The Court: Yes.

Q. How far did this very light, headlight, on that same night show?

Mr. Allen: I object unless he is in a position to show it.

The Court: Did you see the light?

The Witness: Yes.

The Court: You saw it plainly, is that right?

The Witness: Yes.

The Court: Could you see how far or for what distance this light threw ahead of the tender?

[fol. 308] The Witness: About 800 or 900 or 1000 feet.

The Court: You could see that; is that right?

The Witness: Yes.

Q. Where were you when you saw that?

A. At Daly's.

The Court: Where were you, on the ground or were you on the tender?

The Witness: On the ground.

Q. You had been with that engine before.

A. Yes, sir.

Mr. Brumley: That is all.

Cross-examination.

By Mr. Allen:

Q. Mr. Cook, from the time you left Daly's until the time your train stopped after the accident you remained down in the lower part of the caboose.

A. I did.

Q. You were not up in the cupola at all.

A. No, sir.

Q. You didn't see the automobile.

A. No, sir.

Q. At any time until after the accident.

A. No, sir.

Q. Where did you hear the bell?

A. At Stockbridge south of the crossing.

Q. South of what crossing?

A. Stockbridge.

Q. Is that the crossing where the accident happened?

A. No, the other one.

Q. The other one?

A. Yes.

Q. Did it stop after you left there?

A. No.

Q. Was it going all the time?

A. Continuous.

Q. When did it stop? You say it stopped after you left there.

A. I don't know.

Q. How long did it ring?

A. Well, two or three minutes.

Q. Was it ringing when you heard these two longs and two shorts repeated?

A. Yes, sir.

[fol. 309] Q. Was it ringing at the time the first whistle was blown?

A. Yes, sir.

Q. You told Mr. Brumley that when you came to a stop it was not ringing, didn't you?

A. No, it was not ringing then.

Q. Was it ringing at the time the brakes were on?

A. Yes, sir.

Q. When did it stop ringing?

A. I don't know.

Q. Between the time that the brakes went on and the time the train stopped?

A. I don't know.

Q. Did you hear it ring at the time you got off the caboose?

A. No, sir.

Q. How long did you stay there?

A. 6:45.

Q. Did you say that because you heard him saying it (indicating)?

A. No, sir.

Q. Did you make any time record?

A. I did.

Q. Do you have to file a report too?

A. No, sir.

Q. They hadn't taken the bodies away yet, had they, the body and Mr. Hoffman?

A. I believe they took Mr. Hoffman.

Q. They took what?

A. I believe they took Mr. Hoffman away.

Q. I see. You didn't go to the head of the train after it stopped, did you?

A. No, sir.

Q. Your fireman didn't come back, did he?

A. Not that I can recall.

Q. No. He would be on the right side as you were going forward, wouldn't he?

A. Yes.

Q. On the side from which this automobile came.

A. Yes, sir.

Q. And you say you didn't hear any thump or sound of any kind?

A. I did not.

Q. And what fixes it in your mind that the time you heard the last whistle the caboose was about on the crossing? What fixes that in your mind?

A. The brakes, the jar.
[fol. 310] Q. The last whistle was just blowing when the brakes were on, right?

A. Right.

Q. And the brakes went on just about the time that the front end of the caboose was on the crossing; is that right?

A. About the front end?

Q. Yes.

A. Say that again, please.

Q. And the brakes went on about the time that the front end of the caboose was on the crossing?

A. Just about.

Q. Just about?

A. Yes.

Q. Do you know about how long the engine and tender are in feet?

A. Oh, about 30 foot.

Q. 30 foot?

A. About 30.

Mr. Allen: That is all.

Mr. Brumley: That is all.

The Court: All right, that is all. Gentlemen, we are going to take a recess until Monday at 10:30. I don't think I have to admonish you any further. You can see as you go along the importance of having this case decided without any suggestions from any outsider, so please do not discuss it with anybody or let anybody discuss it with you. That is what I want it to be and that is what I know it is going to be. All right, Monday at 10:30.

[fol. 311] Brooklyn, N. Y., November 18, 1941,
(10:30 A. M.)

Trial Resumed

Before—Hon. Matthew T. Abruzzo, U. S. D. J., and a Jury

(Appearances: Same counsel as heretofore noted.)

LEON G. ADAMS, called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

Direct examination.

By Mr. Brumley:

Q. Mr. Adams, you are employed by the New Haven Railroad?

A. I am.

Q. In what capacity?

A. As a civil engineer.

Q. How long have you been so employed?

A. Since 1910.

Q. And are you a civil engineer by training and profession?

A. I am.

Q. Have you at the request of the law department made a map of the Buckley vicinity—the crossing and that vicinity?

A. I have.

Q. And what is the scale of that map?

A. One inch equals 40 feet.

Q. And did you personally make the map or the notes for the map?

A. I did.

Q. And when did you do that?

A. The first part of October; October 6th I think was the day that I made the survey.

Q. That is of this year?

A. That is right.

Q. Have you that map with you?

A. I have.

Q. Does it correctly show the railroad crossing known as Elkey-Buckley crossing?

A. It does.

Q. And the highway crossing the railroad?

A. It does.

[fol. 312] Q. And it is drawn to the scale of one inch equals—

A. 40 feet.

Q. —40 feet?

A. Yes.

Q. Will you let me see that map, please?

A. Yes (handing).

Mr. Brumley: I offer this in evidence.

Mr. Allen: There is no objection, your Honor.

(Map received in evidence and marked Defendant's Exhibit G.)

Q. Mr. Adams, will you put this on the easel?

The Court: The bailiff can do that.

Q. I notice, Mr. Adams, a sign down here. What is that?

The Court: You had better come up here and you had better talk loudly so that the stenographer can get what you say.

A. I am pointing to this arrow down in the bottom sector. That is the compass point. North is indicated in this direction (indicating).

Q. So Route 41 runs in what direction?

A. Generally northwest.

Q. And the railroad track runs in what direction?

A. Almost due west at the crossing.

Q. The highway known as Route 41 is how wide?

A. At the crossing it is 28 feet.

Q. Where is the crossing?

A. At the upper section of the drawing.

Q. And at that point how wide is the railroad right of way?

A. The distance between the fences; I have it noted here—is 42 feet; between these fences (indicating).

[fol. 313] The Court: The fences there are depicted by this black line, these black lines?

The Witness: Right; that is correct.

The Court: To the east of the track; right?

The Witness: That is right.

Q. To the east of the highway?

A. Yes; east of the highway and on each side of the track.

The Court: The track itself is the sort of pink board?

The Witness: Yes.

The Court: The road is black?

The Witness: That is correct.

The Court: What is this pink part away over to the right (indicating)?

The Witness: That is the gravel road leading down to the house.

The Court: From where it says "House", down at the bottom to the top of the map, that is a gravel road?

The Witness: Yes.

The Court: It has two forks up there, hasn't it?

The Witness: Yes.

Q. Do you know whose house that is that is marked at the bottom of the picture?

A. I heard one of the witnesses testify that she lived in that house.

Q. Miss Gennari's house?

A. Yes, that is the house she testified she lived in.

Q. In the center a little bit to the right of this exhibit you have a drawing. What is that?

A. That is the larger scale of drawing of the railroad warning sign located at that point there (indicating).

The Court: What is it marked?

The Witness: Just a sign indication and there is a small—

[fol. 314] The Court: What have you got on the map to indicate it?

The Witness: It is a duplication from this, only a smaller one (indicating). It is a diamond in a circle.

The Court: What letter do you want to put there?

The Witness: We call them Distant Warnings.

The Court: Put "D. W." right where that indicates a sign there.

The Witness: All right (marking on paper).

Q. How far is that distance warning sign from the west rail?

A. That is 319 feet.

Q. Going toward the railroad track between the distance warning sign and the rail do you come to a bridge?

A. I do.

Q. Where is that indicated on the map?

A. That is indicated on the location where the river is shown crossing. The river is shaded blue.

The Court: Put a "B" there. That is the bridge.

(Witness marks on paper.)

Q. How far is the distant part of the bridge from the nearest rail, the farther away, the northwest direction of the bridge, the end of the bridge?

A. That is 258 feet from the rail.

Q. How far is the southeasterly portion or part of the bridge from the rail?

The Court: You mean this (indicating)?

Mr. Brumley: Yes.

A. That is 214 feet from the rail.

Q. So the bridge itself is approximately 46 feet wide?

A. That is right; 46 feet long.

[fol. 315] Q. Long, yes.

A. Yes.

Q. After leaving the bridge and going toward the railroad track is there another railroad crossing sign?

A. Yes, there is.

Q. Where is that indicated on the plan?

A. That is located at a point just north of the rail.

Q. What is that known as?

A. We call them windmill signs.

The Court: "W.M."

The Witness: Yes.

The Court: The Court marks the letters W.M. at that point.

Q. What kind of sign is that?

A. That is like a letter X and it has certain printing on it, of which I can tell you if I refer to my notes. It says, "Railroad Crossing. Stop, Look, and Listen."

Q. How far is that sign from the nearer rail measured along the highway?

A. Measured along the highway it is about 35 feet, I believe. I didn't take that direct measurement. I think it is. Yes; 35 feet measured along the west edge of the highway.

Q. Near the railroad crossing sign or windmill sign that you described is there a telephone pole?

A. There is.

Q. Is that shown on your plan?

A. It is.

Q. Will you mark it "T.P."?

A. Yes (marking on paper).

Q. And how far is that telephone pole from the near rail?

A. That is 9.7 feet.

The Court: How far is it off the road?

The Witness: I haven't that measurement taken directly.

The Court: From the end of the road to the nearest end of the pole is how far?

The Witness: It is around 11 feet.

[fol. 316] Q. That is a single trackway railroad there, isn't it?

A. It is.

Q. What is the gauge or distance between rails?

A. 4 feet 8½ inches.

Q. And that is true throughout the distance of the track shown in this plan?

A. It is.

Q. To the left of the highway going toward the railroad track—that is, going from the northwest to the southeast, as Mr. Hoffman was traveling on the night of the accident, is there an electric light pole?

The Court: Pardon me, if you don't mind. Between this bridge and the railroad crossing is there an electric light pole anywhere on that stretch?

The Witness: There is.

The Court: Where?

The Witness: At a point between the forks of the road leading to the Gennari house.

The Court: Between the two forks?

The Witness: Yes.

The Court: And the Court will draw a line to that with an arrow at the end, and we will put "E.P." for "electric light pole," with a line under it.

Mr. Brumley: How far is that pole from the rail measurement along the highway?

The Court: From the railroad track?

The Witness: It is a distance of 53 feet measured along the east side of the highway.

Q. Does that electric light pole have a bulb in the top?

A. It does.

Q. And how high is that bulb, approximately, above the roadway?

A. I estimated at the time it was 20 feet.

Q. Will you tell us whether or not the roadway is level northwest of the track, the right side of the track? Look [fol. 317] at this exhibit (handing to witness).

A. Shall I begin at the track where this is and work this way (indicating)?

Q. Yes; begin at the track and work back.

The Court: Begin at the track and work northwest so that the jury will understand it. That is the route this

plaintiff was traveling on the night of the accident, is it?

Mr. Brumley: Yes.

The Court: All right; go ahead.

A. The grade is almost uniform, slightly descending from the railroad track to a point 400 feet away from the crossing, which is about at that location, and that rate of grade is a uniform rate of a drop of 3 feet in a distance of 400 feet; in other words, it is a grade of 9 inches descending away from the railroad track, 9 inches per 100 feet, or three-quarters of one per cent. downhill to this point 400 feet from the track.

The Court: From where the map is marked with this D.W., that is, the distant warning?

The Witness: The distant warning.

The Court: The road up to the track is fairly level?

The Witness: Well, it is rising 9 inches in 100 feet.

The Court: 9 inches in 100 feet?

The Witness: Yes.

The Court: What kind of grade would you call that?

The Witness: Three-quarters of one per cent.

Q. Practically level?

A. Yes, sir.

Q. At that point for a distance of 100 feet what is the grade, would you say?

A. The grade tends toward the northwest approximately at a 4 per cent. grade.

[fol. 318] Q. When you say 4 per cent., you mean what?

A. I mean 4 feet rise in 100 feet.

Q. Then in 400 feet it would be a 16-foot rise?

A. That is right.

Q. Over to the left of your map—left, looking at the map, and left of the crossing, you have marked "Church." Is that right?

A. That is right.

Q. How far is that church from the railroad track measured along the highway?

A. Approximately 800 feet.

Q. Going back to the crossing again, there has already been referred to a roadway leading off from the highway down to a house.

A. Yes.

Q. There are two lead-offs, are there?

A. That is correct.

Q. And how far is that road from the rail? Take it up by the electric light pole. How far is that roadway from the rail?

A. The farther point is about 70 feet where the road begins to turn in.

Q. That is going down toward the railroad track from the right to the left as you look at this map of the roadway?

A. The farther point of the roadway is about 70 feet.

Q. The farther point of the roadway is about 70 feet from the track; is that right?

A. That is correct.

The Court: Is that the farthest fork from the crossing? Is that correct?

The Witness: That is correct.

The Court: There is another fork nearer to the crossing. What is that distance?

The Witness: That fork is rather indeterminate on the ground. It has been driven over. They have cut in even shorter than shows there, but the main part of the road, the near edge, is around 20 feet.

The Court: Has that road any name, or don't you know? [fol. 319] The Witness: I don't know of any. It is a private road leading up to that house. It is a driveway, say.

The Court: Let us mark that "A."

Mr. Brumley: Route 41 is sometimes described as the Albany Road?

Mr. Allen: Yes.

Q. In regard to the elevation of the railroad track or the level of the railroad track approaching the crossing, will you describe that?

A. I ran the profile of the railroad from the crossing to a point 1200 feet down the track and the difference in elevation—

The Court: Is that the "Church" mark on the map you are talking about?

The Witness: Yes.

The Court: From the Route 41 back in the direction on the map that is marked "Church," you took a profile for 1200 feet?

The Witness: At a point 1200 feet from the crossing the track is 14 inches lower than it is at the crossing.

Q. Then, putting it in another way, approaching the crossing going toward State Line for a distance of 1200 feet the track then is upgrade 14 inches?

A. That is correct.

Q. Does this map show the location of the whistling post for that crossing?

A. It does.

Q. Where is that?

A. It is off on the poles here (indicating).

Q. It is marked with the letter W at the extreme left end of the drawing.

The Court: The Court makes a line with an arrow and "W.P.," with a line under it.

[fol. 320]. Q. Is that whistling post between two ponds?

A. It is.

Q. Those ponds are shown on your plan?

A. They are.

Q. And on both sides of the railroad track?

A. Yes, they are.

Q. How are they shown?

A. They are shaded with a blue outline with the water line.

The Court: Do you see it?

Mr. Brumley: That mark, W.P., for Whistling Post, at the very left of the plan, is how far from the crossing?

A. It is 1335 feet from the near edge of the crossing.

Q. Near the church, to the right of the church, looking at the map I note a series of dots. What are they?

A. That indicates a path running from the north side of the church across the railroad track over and past a cider mill, located rather south from the Gennari house.

Q. How far is that path that you have just described measured along the highway from the crossing?

Mr. Allen: Do you mean the beginning of the path?

Mr. Brumley: Yes, the beginning of the path measured along the highway from the crossing.

A. If that protruded right through to the highway it would intersect at a point 750 feet from the rail.

Q. How far?

A. 750 feet from the rail.

Q. Did you also, Mr. Adams, prepare a smaller plan showing a larger area than this one? •

A. I have such a plan with me. It was made from the office records. It was not prepared particularly for this case.

Q. Will you let me see that?

A. Yes (handing to Mr. Brumley).

Q. What is the scale of this plan?

A. One inch equals 100 feet.

[fol. 321] Q. This takes in part of the Village of West Stockbridge, does it?

A. It does.

Q. And it shows the Main Street and Center Street crossings?

A. I think it does. That shows the main street.

Q. And also shows the Buckley crossing, does it not?

A. It does.

Mr. Brumley: I offer that in evidence.

Mr. Allen: There is no objection.

(Map marked Defendant's Exhibit H.)

Q. Going back to the large Exhibit G, you have shown at the bottom of that exhibit, have you not, the road elevation and the rail elevation?

A. I have.

Q. That is at the lower part of the plan?

A. This is the rail (indicating).

Q. The right-hand side of the plan to the center shows the rail?

A. It does.

Q. And does the right side of the plan show the road elevation?

A. The highway intersecting at that point (indicating).

Q. And the rail and the road intersect at the point marked "O plus O," is that right?

A. O plus O; that is right.

Q. This smaller plan, marked Defendant's Exhibit H, shows what, Mr. Adams, in a general way?

A. It shows the layout of the railroad track and the highway from the Village of West Stockbridge to the Elkey-Buckley crossing.

Q. The Elkey-Buckley crossing; is that at the right of that Exhibit H?

A. It is.

Q. And does the whistling post show for that crossing?

A. It is not indicated on the crossing, but it is located—

Q. Do you mean on the plan?

[fol. 322] A. On the plan; but it is located at a point midway between the two ponds approximately.

Q. I notice also at the left of the exhibit a crossing known as Center Street; is that true?

A. Yes.

Q. And then is there also another crossing where Main Street goes over the railroad?

A. There is.

Q. And how far can you tell us along the highway is that Main Street crossing from the Buckley crossing?

A. Along the highway the distance is approximately 2800 feet, center to center of crossing.

Q. 2800 feet; that is a little more than a half-mile, then?

A. That is correct.

Q. There are 5280 feet in a mile?

A. That is right.

Q. That is the only thing I remember; and this is 2800 feet?

A. That is correct.

Q. Measured along the railroad track what is the distance?

A. The distance is approximately 2950 feet.

Q. There is only a difference of 150 feet between the two crossings of the highway compared with the railroad?

A. That is correct.

Q. Now will you take the stand, Mr. Adams?

A. (The witness returned to the witness chair.)

Q. Did you at my request make certain observations in respect of lines of sight?

A. I did.

Q. Did you make some taken during the daytime?

A. I did.

Q. About when was that done?

A. It was around some time between 2 and 4 in the afternoon of October—I will have to refer to my notes; I don't remember the date. On October 6th.

Q. And without describing any distances just describe and tell us what you did.

Mr. Allen: I object to that as immaterial, your Honor, as to the observation.

[fol. 323] The Court: Yes; sustained.

Mr. Brumley: Exception, your Honor.

Q. Did you take any line of sight along the railroad track from the highway crossing?

Mr. Allen: Same objection.

The Court: Objection overruled.

A. Yes.

Mr. Allen: Exception.

Q. What observation did you take?

Mr. Allen: I object.

The Court: Sustained.

Mr. Brumley: Exception.

I don't want to ask a series of questions here, your Honor. May I state what I have in mind?

The Court: No. I think the general rule as to what observations he makes, applies, that it is not relevant evidence for this jury. You have got your exceptions. You have got your distances from your map and you have what the plan says and what the witnesses say as to the condition that existed there at that time.

Mr. Brumley: I wanted to show the view along the railroad track.

The Court: You may ask him what the condition is; but you cannot ask him for what he could see. You see my point. He may go there expressly to make one view and that is not the only test here, because this man in the car had other things to do besides just looking for one thing.

Mr. Brumley: Of course; but what could he see?

[fol. 324] The Court: At the crossing you have put on the map that distant whistling post; is that right?

The Witness: Yes.

The Court: As you came along that road with an automobile and you came up to the track did you take an observation about 6 o'clock or while it was dark or as to how far you could see to your left?

The Witness: I was there when it was dark. I didn't take any particular observation when it was—

The Court: All right: Let us put it this way: as you came up to that railroad crossing and you looked to your left in the direction that this young man was going, was the track straight for any distance?

The Witness: No, it was not.

The Court: It runs, as you depicted it on the map. Is that right?

The Witness: That is correct.

The Court: As you stand at the crossing there and you look down at the track will you describe the condition that you see as you look down to the left?

The Witness: The track is unobstructed for a distance of 480 feet from the crossing.

The Court: You can see 480 feet from the crossing?

The Witness: That is correct.

The Court: And then beyond that point what does the track do?

The Witness: The track has a curve to your right as you are looking down the track in behind the hill.

The Court: I see. All right.

[fol. 325] By Mr. Brumley:

Q. How far down the track can you see if you stand 5 feet from the crossing?

Mr. Allen: I must object, your Honor.

The Court: Sustained.

Mr. Brumley: Exception.

Mr. Allen: It has got to have something when it is dark. The witness has not said that he observed the darkness.

Q. How far down the track can you see when you are 10 feet from the crossing?

Mr. Allen: Same objection.

The Court: Exception.

Mr. Brumley: I take it your Honor will sustain all objections as to that point?

The Court: Yes. I have allowed you to go as far as you can go, and the rest is for the jury to make their determination. You can have an exception to my refusal to let him answer the other questions.

Mr. Brumley: Yes, I will take that exception.

Q. Did you make certain observations at night from the crossing?

A. I did.

Q. When were they made?

A. Between 8:45 and 9:45 P. M.

Q. Do you know what day that was?

A. On October 14th.

Q. And what kind of night was it?

A. It was a clear night without a moon, as I recall it.

Q. What observations did you make that night?

A. I observed—

[fol. 326] Mr. Allen: I object, your Honor, to the form of that question.

The Court: Yes, sustained.

Mr. Brumley: Exception.

Q. Did you on that night observe any engine approaching the crossing?

Mr. Allen: I object to the form.

The Court: Sustained.

Mr. Brumley: Exception.

Q. Did you observe any headlight on any engine approaching the crossing that night?

Mr. Allen: Same objection.

The Court: Sustained.

Mr. Brumley: Exception. That is all.

Cross-examination.

By Mr. Allen:

Q. Mr. Adams, when you answered his Honor's question about observation to the left for a distance of—you said "unobstructed view of 400 feet." Do you recall that?

A. I think I said 480 feet.

Q. I got it 400.

A. 480, it was.

Q. That was in the daytime when you made that observation?

A. That was.

Mr. Allen: Now let me have your Exhibits A, B, and C.

(Papers handed to counsel.)

Q. This sign that has been marked D.W. on Exhibit H is a sign that is shown here at the right on Defendant's Exhibit A; is that right (handing to witness)?

A. That is right.

[fol. 327] Q. And this sign that has been marked on Defendant's Exhibit H as W.M. I think you referred to as a windmill sign?

A. Yes.

Q. Is this sign that is shown here on Exhibit H up near the track? Is that correct (handing to witness)?

A. Yes, that is correct.

The Court: That is Exhibit G, Mr. Allen? Isn't it Exhibit G, Mr. Allen?

Mr. Allen: No.

Mr. Brumley: Yes.

The Court: It is the first. You said Exhibit H.

Mr. Allen: I am sorry. May I have it and make the correction?

The Court: Yes, the correction is made. It is Exhibit G.

Q. And that windmill sign, as you call it, is shown clearly in Exhibit B (handing to witness)?

A. It is.

Q. You told his Honor, I think, that there was no straight track to the left toward West Stockbridge as you look from the crossing?

A. Yes, that is correct.

Q. The curve starts where?

A. Immediately at the east side of the highway.

Q. On the east side of the highway?

A. Yes.

Q. And that curve is indicated on Exhibit H as extending back toward the town or Main Street crossing, is it not?

A. Yes, it is.

Q. In fact, the track makes quite a U there, doesn't it?

A. Yes.

Q. When you were asked by Mr. Brumley how high the electric pole was, you said you estimated it at 20 feet?

A. Yes.

Q. You didn't make any measurement?

A. I didn't actually measure it.

[fol. 328] Q. That is a town light or a village light; isn't that correct?

A. That is right.

Q. That is not a railroad light at all?

A. That is correct.

Q. As a matter of fact, the railroad has no light whatever around that crossing, has it?

A. They have not.

Q. Did you make any estimate or figures as to the height of the embankment to the left of the track as it approaches the highway and the Buckley crossing?

A. I didn't measure it.

Q. There is an elevation at the place that you have indicated here with these dots as the pathway leading from Route 41 down toward the Gennari house, isn't there?

A. That is correct.

Q. And you made no attempt to ascertain what that elevation was?

A. I have no accurate measurements of it.

Q. Does that elevation extend quite a distance along that track between the town crossing and the Buckley crossing?

A. It does.

Q. So this track as you approach it from Route 41 alongside the church and from the Elkey-Buckley crossing back to the town crossing is below the level of the land, is it?

A. It is.

Q. For practically all the way?

A. It is.

Q. Where you indicate "Bridge," the bridge goes over the brook that runs underneath it; is that right?

A. No doubt.

Q. I notice you have some other objects here designated like the cider mill and a barn and a coop; is that right?

A. That is correct.

Q. Those are over near this house which you understand to be the Gennari house?

A. That is correct.

Q. I notice you have some other places indicated here without the names on them.

[fol. 329] A. Those are private houses and probably barns and garages against them, and most of them I think are private houses.

Q. Was there any particular reason for leaving out these houses?

A. Why, I showed everything up as far as the house.

Q. From the crossing up to the church you showed all the buildings; is that correct?

A. Yes; all those that are close to the street. There may be buildings in the rear. I didn't go back to those.

Q. I see. And here to the right there are two objects and one looks like a standing lamp. What is that?

A. That is a house with the driveway in front.

Q. This is a driveway leading to that house (indicating)?

A. Yes; and this is the sidewalk I think leading to the center of the house with a driveway to the house.

Q. What is this? Oh, this is a driveway and that is a path (indicating)?

A. And that is a path.

Q. Oh, this is another little house over here (indicating)?

A. That is right.

Q. And some more houses shown farther to the right (indicating)?

A. That is right.

Mr. Allen: That is all.

Mr. Brumley: That is all. Thank you, Mr. Adams.

HARRY ELLJAH MEACH, called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

The Court: Do you need this map any more, Mr. Brumley?

Mr. Brumley: I don't think so; no.

Mr. Allen: No—not for the present; no.

The Court: Take it away, then.

Direct examination.

By Mr. Brumley:

Q. Where do you live?

A. Great Barrington, Mass.

[fol. 330] Q. On the night of December 25th, 1940 were you the fireman—

A. Yes.

Q. —on the engine in this grade crossing accident?

A. Yes, sir.

Q. How long have you been employed by the New Haven Railroad?

A. Why, I am in my 26th year; since 1916.

Q. And how long have you been running over the territory involved in this grade crossing?

A. Why, most of my firing has been done up this branch.

Q. So you are familiar with it, are you?

A. Yes, sir.

Q. What time of day did you start to work?

A. I believe we went to work at 8:30 this morning.

Q. And this accident occurred about what time?

A. Between 6:05 and 6:10.

Q. Leaving Daly's that night how was your train made up?

A. Well, the hack was on the south end and then there was the engine in the middle and the tender was on the north end.

Q. When you say "hack," do you mean the caboose?

A. Yes.

Q. In which direction was the engine facing?

A. The engine was facing south.

Q. That is, it had its nose into the caboose?

A. Yes, sir.

Q. And then the tender was ahead of the engine?

A. Yes; north of it.

Q. On the rear of the engine; but it was the first part of the train to move forward?

A. Yes, sir.

Q. Riding up from Daly's what was your position?

A. Well, when I was not firing I was staying on my side, walking toward the head end of the train, the head of the train.

Q. Where was the engineer?

A. He was opposite me.

Q. Opposite you?

A. On the other side of the engine, doing the same.

[fol. 331] Q. Leaving Daly's was the headlight on the tender lighted or not?

A. It was lighted.

Q. What time did you leave Daly's?

A. I didn't look at my watch.

Q. And approaching the Buckley crossing where were you?

A. On the fireman's side, on my seat.

Q. What kind of seat is it?

A. Why, that is a little box perhaps that high (indicating).

Mr. Allen: Indicating about how many feet?

The Witness: Well, a couple of feet.

Mr. Allen: Well, 2 feet.

The Witness: 2 feet; and perhaps that long (indicating).

Mr. Allen: Indicating 2 feet again?

The Witness: It is a little wider than it is high.

Mr. Allen: 3 feet.

Mr. Brumley: 2½ feet.

Mr. Allen: All right.

Q. In which direction were you facing, railroad direction?

A. I was facing going north.

Q. That is toward the crossing?

A. Yes, sir.

Q. Do you know where the whistling post is for that crossing?

A. Yes, sir.

Q. At the whistling post did you hear any whistle?

A. Yes, sir.

Q. Just describe what you heard in regard to the whistle between the whistling post and the crossing.

A. Well, he started to blow the whistle. He blew one long and then a flat, or whatever you call it.

Mr. Allen: Then a what?

Q. Don't drop your voice.

A. He blowed one long whistle and then right after that [fol. 332] another long whistle and then a short whistle and then another short one, prolonged.

Q. What do you mean by "prolonged"?

A. Why, to cover the distance of the whistling post to the crossing, so that—

Mr. Allen: I object to "to cover the distance."

The Court: As to "prolonged," strike that out.

Q. Did the long whistle continue up to the crossing?

A. Yes, sir.

Q. Are you sure about that?

A. Yes, sir.

Q. What about the bell; what did you hear, if anything, as to that?

A. Well, the bell was ringing.

Q. From where to where?

A. Why, he never shut it off that night from the town crossing until the time we stopped after the accident.

Q. Is that bell an automatic bell?

A. Yes, sir.

Q. How is it operated?

A. A little valve right in front, on the boiler button in front of the engineer's seat, a little round valve about that big (indicating). It shoots into the air.

Q. As you sat in your seat looking north could you see whether the headlight was lighted or not on the tender?

A. Yes.

Q. And was it lighted?

A. Yes, sir.

Q. How far would you estimate that that headlight showed up?

A. 1,000 feet.

Q. And threw this light ahead 1,000 feet?

A. Yes.

Q. What was the speed of your train as you approached the crossing?

A. Why, 15 to 18 miles an hour.

Q. Tell us what you saw as you approached this crossing. Don't talk too fast, because we want to hear every word.

A. Well, what do you mean—just the exact distance that I stopped?

Q. No. I want to know just what you observed as you [fol. 333] sat in your seat, what you were looking for.

A. I sat in my seat with my head at the window. I have to have my head at the window to see—in order to see by the head, and the first I noticed was the reflections of the headlights.

Q. Were they—where were those reflections of the headlights?

A. On the bridge and on the opposite side of the crossing.

Q. Going ahead.

A. And I went along a little farther—perhaps 100 feet or so—and I saw the car come off of the—that would be the end of the bridge toward the track.

Q. Go ahead.

A. And we went still further. We seemed to be coming about the same distance in speed together toward the crossing, and when we got to an engine's length, I would say, the car appeared to slow down. The automobile appeared to slow down.

Q. When it appeared to slow down about how far was it from the track?

A. Oh, I should say 18 to 20 feet.

Q. Go ahead.

A. And we kept coming, and all of a sudden the car seemed to pick up speed. The minute I saw the car pick up speed I hollered, "Stop!" The engineer put the automatic brake on.

Q. Yes. Go ahead.

A. And we didn't—it wasn't much of a bump at first, if that is what you want to call it.

Q. Yes.

A. When we got about opposite—there is a telegraph pole just a little ways—

Q. Beyond the highway?

A. Just beyond the highway there. It was quite a crash.

Q. Yes.

A. And we went up there and made the stop, and the engineer got off and went back down to the accident, down to the crossing.

Q. Did you go back to the crossing?

A. No, sir.

Q. You stayed on the engine?

A. I did.

Q. After the accident did you observe whether the headlight was on the tender or not?

A. Yes, sir.

[fol. 334] Q. After the accident do you know whether there was any headlight on the locomotive, the south end of the locomotive?

A. Yes, sir.

Q. Who put that on?

A. The engineer.

Q. When?

A. Right after we stopped.

Q. How far was your engine north of the crossing after you stopped?

A. Well, it was 100 feet or better, a little over 100 feet maybe.

Q. The engine or the caboose?

A. The engine.

Q. Did the engineer put the brakes in emergency after you hollered?

A. Yes, sir.

Q. When did you first see the automobile?

A. When it came off the bridge.

Mr. Allen: I object to this as repeating.

The Court: Yes; sustained. He has already testified to that.

Q. Where were you in relation to the crossing when you first saw the automobile? I mean how far from the crossing, about?

A. Oh, 350 or 400 feet.

Q. And what would you estimate the speed of the automobile to be at the time when you first saw it?

A. Well, that is pretty hard for me to say; but I drive a car.

Q. All right. Then don't estimate it. How far were you from the crossing when the automobile seemed to slow down, as you have described it?

A. Why, I should say 50 feet.

Q. And did the automobile at any time come to a stop prior to the accident?

A. No, sir.

Q. The answer is what?

A. No, sir.

Q. Did the automobile stop at any place between the bridge and the railroad track?

A. No.

Q. When the automobile picked up speed again, as you have described it, after slowing down how far were you from the highway?

A. Why, we was just—the head of the train was just coming on the crossing.

[fol. 335] Mr. Allen: Just what?

The Witness: Just coming on the crossing.

Q. That is the head end of your tender?

A. Head end, yes, the north end of the tender.

Q. What was your engine number that night?

A. 438.

Q. After the accident did you make any examination of the tender and engine?

A. Yes, sir.

Q. When was that made?

A. Well, I looked at my watch after the engineer had just stepped down on the ground. It was just ten minutes after six, and I got my watch out and hopped off and made the examination.

Q. Tell us what you observed and take it slow and easy.

A. I tried to get off on my side of the engine but I didn't find any step to step off, and so I walked around the far end of the engine. I walked toward the light and around the back. First I stepped on a step on the rear of the tender. It was bent in toward the rear a trifle and back toward the engine at about that angle toward the engine and in toward the wheel on the tender just a trifle (indicating).

Q. Did you see anything else?

A. Then I walked up and the steps was hanging there between the engine and the tender.

Q. The steps were what?

A. The steps was hanging there. It was not gone entirely. It was not gone entirely. The four steps between the engine and the tender, between steps.

Q. Were they broken?

A. Yes, sir.

Q. I show you Defendants' Exhibit F and ask you to look at that and at the right-hand side of that photograph are two letters BX indicating the step at the north end of the tender. Do you see that BX?

A. Yes, sir.

Q. Was that the step that you have described as broken?

A. No, that was the one—

Q. I mean as bent.

A. Yes, sir.

[fol. 336] Q. There is another mark on that step FX, indicating the steps between the tender and the locomotive. Do you see that?

A. Yes, sir.

Q. Are those the steps that were broken?

A. Yes, sir.

Q. When you were at Daly's was that step broken between the tender and the engine?

A. No, sir (handing to Mr. Brumley).

Q. Those are the steps on your side of the engine?

A. Yes.

Q. And this photograph shows the window, does it, on your side?

A. Yes.

Q. Out of which you were looking?

A. Yes.

Q. The picture of the man in this photograph is facing toward the head end of the train.

A. Yes, sir.

Q. Were you facing that way?

A. No, sir.

Q. You were facing in the opposite direction?

A. Yes, sir.

Q. Toward the head end of the tender?

A. Yes, sir.

Q. Did you observe after the accident any damage to the head end of the tender?

A. No. Just what I have mentioned.

Q. Just the two steps?

A. That is all I could notice.

Q. How does the light on that engine operate, the light on the tender?

Mr. Allen: I object to it as already answered.

Mr. Brumley: No, he has not described that at all.

The Court: I will let him answer that.

A. Why, there is a wire running along. This light is hooked on to the back of the tender. There is a little step on the rear of the tender where you walk up and where you put the water in the tank, and this light hangs right in the center, and there is a cord runs along the side of it and hooks into a little socket right back of the engineer's feet in the cab of the engine.

[fol.337] Q. How was it turned off and turned on?

A. Just like you turn on an ordinary light switch or off with a—

Q. Did you at my request get a lamp and a bulb—that was like the lamp and bulb on the engine that night?

A. Yes, sir, I tried it. I brought it down but I haven't got it with me now. It is over in your office.

Q. That is the same light?

A. The same kind of bulb was in there, yes sir.

Q. The same kind of reflector?

A. I won't say about the reflector.

Q. I mean the same kind of lamp?

A. Yes. Yes.

Mr. Brumley: I should like to offer that in evidence, your Honor. I have it here.

The Court: You cannot offer something in evidence that is not here.

Mr. Brumley: It is here, your Honor.

The Court: Do you have it in court?

Mr. Brumley: Yes.

Mr. Allen: I must object to it on this witness's testimony.

The Court: Sustained.

Q. Was this the same type of lamp, Mr. Meach, that you have described?

A. Yes.

Q. That you have described as being on the engine that night?

A. Yes. Yes.

Q. Is it the same kind of bulb?

A. The same size bulb.

Q. The same size lamp?

A. Yes.

Mr. Brumley: Now I offer it again in evidence.

Mr. Allen: The same objection, your Honor.

The Court: Sustained.

Mr. Brumley: Exception.

Q. Do you know the size of the bulb on that night?

A. 32 volts and 250 watt.

[fol. 338] Q. After the accident do you know whether the engineer shut off the bell?

A. Yes, sir.

Q. Did he?

A. Yes, sir.

Q. When was the light on the tender shut off after the accident?

A. It was not shut off.

Q. Did it stay on until you got to State Line?

A. It was lit when we left the engine on the pit.

Q. At State Line?

A. Yes, sir.

Q. When did you leave the scene of the accident and go up to State Line? That is, when did the engine?

A. Well, I didn't look at my watch.

Q. About what time?

A. 6:45.

Q. 6:45?

A. Yes.

Q. And from the time that you first saw the headlights of the automobile or the reflection of headlights on the bridge did you take your eyes off those lights?

A. No, sir.

Q. Were there any other cars on the highway that you observed approaching that crossing?

A. I didn't observe none, not any.

Q. What time did you get into Daly's that night prior to the accident?

A. Well, I didn't look at my watch.

Q. About what time?

A. I should say around 5:30.

Q. What trip did you make?

A. In the morning we went down to Great Barrington.

Q. No, but I mean you got into Daly's about 5:30, you say?

A. Yes, sir.

Q. From what place did you come?

A. Pittsfield.

Q. Did you have any cars coming from Pittsfield to Daly's?

A. Well, we had a few; I don't remember how many.

Q. Making the trip from Pittsfield to Daly's before the accident in which direction was your engine headed?

A. South.

Q. Was it ahead on your train or was it backing up?

A. Headed down from Pittsfield?

[fol. 339] Q. Headed south?

A. Yes, sir.

Q. Was the headlight on the engine lighted between Pittsfield and Daly's?

A. Yes, sir.

Q. Do you know what time you left Pittsfield?

A. I don't exactly. It was after a patent train went out.

Q. After a patent train went out?

A. We had to wait until they cleared the block and then we followed it on if I remember rightly.

Q. Just before you felt the impact or the collision where was the automobile?

A. Why, about a foot or two from the track and into the back end of the tender.

Q. How far was your tender over the crossing at that time?

A. Well, it was about I should say just a trifle over the highway over the white line that goes through the road.

Q. Did you see the automobile at the time of the collision?

A. No, sir.

Q. (Continuing.) With the tender?

A. No, sir.

Q. What did you do at that time?

A. I turned my head or turned around to keep my head turned around so that I couldn't see what happened when we got by. I didn't care to witness it, in other words.

Q. Was it a clear night?

A. Yes, sir. Yes, sir.

Mr. Brumley: That is all.

Cross-examination.

By Mr. Allen:

Q. Mr. Meach, I believe you told Mr. Brumley that you worked on this branch for quite a little while, had you?

A. Yes, sir.

Q. And you had made the trip from Daly's to State Line frequently.

A. Yes, I had been up there quite often.

Q. Frequently?

A. Yes.

Q. On this night of Christmas last year you were running your engine backwards, weren't you?

A. Up the branch, yes.

[fol. 340] Q. From Daly's to State Line you were running your engine backward?

A. Yes, sir.

Q. Was that because it was easier to do that rather than turn around and run it forward?

A. You can't very well turn around when there is no place to turn around.

Q. Do you mean to say you always run your engine backward?

A. On this job since I have been around they have, yes, sir.

Q. You run this 9 miles backward; is that right?

A. Yes, sir.

Q. I believe you said you were sitting in your seat when you were not firing; is that right?

A. Yes, sir.

Q. This was, then, a hand firing engine.

A. Yes, sir.

Q. It was not a stoker I take it.

A. No.

Q. Of course, when you are riding with your engine headed pilot first and sitting up in your seat you have a window there, haven't you, that you can look through?

A. You mean outside a side window and an end window, both.

Q. You have an end window?

A. Yes.

Q. And you sit there, as this man is sitting in Exhibit F, you can look right through that window and look down alongside the boiler and have a clear view of the tracks ahead; is that right?

A. Yes, sir.

Q. This tender tank is just as wide as the engine isn't it?

A. Yes, sir.

Q. And it is apparently just as high? It comes up to the top of the cab.

A. Yes, just about.

Q. Sometimes when there is coal in it it is higher; is that right?

A. Yes, sir.

Q. On this night did you have a pretty good supply of coal in it?

A. Well, we must have had, because we had got it that day. We had a good supply of coal.

Q. So the top of the tender was even higher with the coal in it than the top of the cab.

A. Yes.

Q. You say you were seated on the cab seat at the time of the accident?

A. Yes, sir.

[fol. 341] Q. When did you last fire that engine?

A. Just before we got to West Stockbridge.

Q. How long before?

A. Oh, about perhaps four or five minutes.

Q. How long did it take you to come from Daly's up to the point where this accident happened?

A. I tell you, I didn't look at my watch at the time of the accident.

Q. How many miles is it?

A. As near as I can figure it is about seven miles and a half from Daly's to this crossing.

Q. And you were engaged for firing your engine about how long?

A. Well, at intervals.

Q. I mean the last time before you reached this crossing.

A. Well, six or ten shovels of coal.

Q. How long did it take you to do that?

A. Oh, a minute or so. A minute or so.

Q. When did you get up on this seat?

A. Coming into West Stockbridge.

Q. Did you make what is known as "Main Street" or "town crossing"?

A. No. There is a crossing before you get to the station.

Q. Do you know what that is called?

A. Well, I understand it is Center Street.

Q. When you got up on the seat where was the engineer?

A. He was on his seat.

Q. Which way was he looking?

A. North.

Q. The way you were going?

A. Yes, sir.

Q. As you sat on your seat which way were you facing?

A. North.

Q. Sitting as this man is sitting in here looking toward the front of the engine if you were sitting in the same position with your back toward that window you couldn't see anything ahead of you, could you?

A. No.

Q. And as a matter of fact looking out from your side of the window how far down or how far out do you have to get before you get to this angle?

A. Just with your head like this, just a slant (indicating).
[fol. 342] Q. Just a slant?

A. Just a slant.

Q. Just about a position that you are in now?

A. Yes, sir.

Q. Just with your head a trifle out?

A. Just sticking your head out like that (indicating).

Q. You can see the tracks in front of you, can you?

A. Not right next to the tender, no, back of the tender.

Q. How far ahead of the tender can you see the tracks as you have just indicated?

A. I don't remember.

Q. You have ridden that way many times.

A. Yes, but I don't pay much attention to that stuff.

Q. You don't pay much attention to that stuff.

A. That's right.

Q. Would you say you cannot see the tracks 500 feet ahead?

A. Yes.

Q. And any less than that?

A. I couldn't say.

Q. You can only see them if they are curved out, can you?

A. You can see them if you look out.

Q. You cannot see a straight track at any time if you look out, can you?

A. The tracks don't curve out in the back of the tender. They run out.

Q. You can't see the tracks ahead of you as you look out at any time, can you?

A. Yes.

Q. You have got to look out a great deal farther than you did then?

A. You can see them if you look out a certain distance ahead.

Q. If you look out; is that right?

A. You got to look out to see them.

Q. During the time that you were sitting in the seat up to the time of the accident you were sitting in the position that you have just indicated to us?

A. Yes; sir.

Q. You say that the bell was ringing?

A. Yes, sir.

Q. When did it start ringing?

A. Before we got on the Center Street crossing.

Q. Did you have anything to do with turning that bell on?

A. No, sir.

[fol. 343] Q. That bell is just a little lever, is it, of some kind?

A. No, it is a little round wheel, just about that big (indicating), which is right on the bell.

Q. Just a little lever?

A. Yes, sir.

Q. Is it on the engineer's side?

A. Yes, sir.

Q. That was ringing from what place?

A. From Center Street.

Q. You say there were some whistles blown?

A. Yes, sir.

Q. Where do you say that they were blown from; what place?

A. What crossing are you speaking of?

Q. This crossing, Elkey-Buckley.

A. Elkey-Buckley; down near the whistling post.

Q. On which side of the track is the whistling post?

A. Right-hand side, on my side.

Q. Did you see it that night?

A. I didn't pay no special attention to it, no.

Q. What makes you say that the whistles started to blow there then?

A. Because I know it is where it is located. I know just where it is located.

Q. In other words, you are estimating when you say the whistle started to blow there?

A. Yes.

Q. Not 300 feet from the track?

A. No.

Q. I believe you told Mr. Brumley there was one long whistle; right?

A. Yes, sir.

Q. Then a second, and then another long whistle?

A. Yes, sir.

Q. When your engineer blew the long whistle how many seconds did he keep it on?

A. I didn't time it.

Q. What is your best judgment?

A. Why, a second.

Q. Just one second?

A. Yes.

Q. That is a long whistle?

A. Yes.

Q. What is a short whistle?

A. Well, perhaps three-quarters of a second.

Q. You said pulling it, a long whistle, just like that (indicating)?

A. Yes.

[fol. 344] Q. That is a long whistle?

A. Yes.

Q. What is a short whistle?

A. I got to take my watch out (indicating).

Q. Why, you pull that down?

A. The same way, yes. That is a long whistle.

Q. You hold it down?

A. Yes, sir.

Q. How long do you hold it down?

A. A second.

Q. A second?

A. Yes, sir.

Q. And then a half-second for the short whistle?

A. Why, a half-second or so; maybe three-quarters of a second.

Q. And that is a short one?

A. According to the distance you have got to go.

Q. According to the distance you have got to go?

A. Yes.

Q. What do you mean by that?

A. Why, if you got 300 feet to go, you wouldn't hold it so long.

Q. Isn't the whistling post supposed to be 300 feet away?

A. Yes, sir.

Q. Was this one?

A. Yes, sir.

Q. You say you started to blow from the whistling post?

A. Yes, sir.

Q. Not only 300 feet away, as the conductor and the brakeman said?

A. I don't know what they said. I don't know what they said.

Q. Then you say you judge how long to hold it by how far away you are from the track; is that it?

A. Yes, sir. We make that two long and two short extending in that space.

Q. This whistling post, Mr. Adams says is 1300-odd feet away. You blew four whistles during that time, did you?

A. Yes, sir.

Q. Two longs—

A. And two shorts.

Q. —and two shorts?

A. Yes.

Q. And you were holding onto the last one, were you?

A. Yes, sir.

[fol. 345] Q. There were not eight whistles blown?

A. No, sir.

Q. You are sure of it?

A. I am sure of it.

Q. And all this time you were seated looking out?

A. I was.

Q. How far from the crossing were you when you first saw this car?

A. What do you mean, a view of the car?

Q. You told Mr. Brumley you saw the headlights, didn't you?

A. About 350 or 400 feet.

Q. About 350 or 400 feet; but that was not around the curves, was it?

A. Around toward the curve.

Q. There isn't any straight track, is there?

A. No, sir.

Q. Where was the car when you saw it?

A. Flashing on the side of the bridge away from the railroad track.

Q. Away from the railroad track?

A. Yes, sir; somewhere——

Q. What is that?

A. Somewhere on that side of the bridge away from the railroad track.

Q. How fast were you going?

A. 15 to 18 miles an hour, I would say.

Q. Weren't you going faster than that?

A. No, sir.

Q. Then you say you saw this car coming toward you?

A. Yes, sir.

Q. And slowed down until it was 15 or 18 feet from the tracks?

A. Yes, sir.

Q. What did it slow down to?

A. 18 or 15 feet.

Q. At what speed?

A. 15 or—8-10 miles an hour.

Q. 8-10 miles an hour?

A. Yes.

Q. So when you say it was 15 to 18 feet from the track it was going 8 to 10 miles an hour.

A. To the best of my judgment.

Q. At that time the head end of your train—that is, the front end of this tank was right at that crossing.

A. Yes, sir.

Q. You were going 15 to 18 miles an hour?

A. Yes, sir.

[fol. 346] Q. Did you hear the testimony about the width of the road there?

A. I think—I believe I did.

Q. You were keeping your eyes on this automobile all the time?

A. Yes, sir.

Q. And just as you got there and the head end got at the crossing your whistle was still being held on and blowing?

A. The whistle stopped.

Q. I thought you said to Mr. Brumley that the whistle was blowing when it got to the crossing?

A. It was right up until the crossing.

Q. So at the time the front end of your train got up to that crossing the whistle had stopped blowing, had it?

A. Yes.

Q. Are you sure of that?

A. Yes.

Q. And this automobile was going 8 to 10 miles an hour up to the front end of your train and then you were going 15 to 18 miles an hour?

A. Yes, sir.

Q. Your whistle was blowing?

A. Yes, sir.

Q. And the bell was also ringing?

A. You can't hear the bell. I know when the whistle is blowing.

Q. You can't hear the bell?

A. You can't hear the bell when the whistle is blowing.

Q. I see. You had this bell ringing all the way down to the town crossing, didn't you?

A. No, sir.

Q. I thought you told these gentlemen that you started it just from the—

A. That ain't down to the town crossing.

Q. How far is it?

A. Why, it is about 1400 feet from there down.

Q. You had the whistle blowing ever since you had reached the whistling post?

A. From the whistling post to the crossing.

Q. All during that time if you had blown the whistle you could hear the whistle?

A. I could hear the whistle.

Q. And if the whistle was not blowing you could hear the bell?

A. If the whistle was not blowing I could hear the bell ring.

[fol. 347] Q. It was ringing practically all the time?

A. It was ringing practically all the time; yes, sir.

Q. As you got to the edge of the crossing it was still ringing?

A. Yes, sir.

Q. And the whistle was blowing loud then?

A. Yes.

Q. And you held onto it?

A. Yes, sir.

Q. Prolonged, as you say?

A. Sure.

Q. Does that make it any louder when you keep it up?

A. I don't know as it makes it any louder.

Q. Then you say that the car shot ahead?

A. Why, yes, sir.

Q. Where was the front of your train when you noticed it shooting ahead?

A. Just coming to the crossing.

Q. What?

A. Just coming to the crossing.

Q. How fast would you say it was going when it shot ahead?

A. I couldn't say the speed. I don't know enough about the speed of a car.

Q. All right, sir.

A. I was a little bit excited there, and things happened very quick.

Q. As a matter of fact, had you been looking out the window?

A. I absolutely had.

Q. Then you say you turned your head away?

A. After I hollered.

Q. When did you holler?

A. Just as the car started to move, to pick up speed.

Q. Just as the front of your train got to the edge of the crossing and the car started up you hollered?

A. Yes, sir.

Q. You then looked away?

A. Yes, sir.

Q. So you didn't see the impact at all?

A. I didn't see the car hit the tender; no, sir.

Q. You didn't see the tender hit the car, either?

A. No, sir.

Q. You don't know how they came together, either, do you?

A. No, sir.

Q. You told us first there was a little noise?

A. Yes, sir.

[fol. 348] Q. And then there was a crash?

A. Yes, sir.

Q. Were you looking forward when that little noise occurred?

A. No, sir.

Q. You don't know what caused the little noise—whether the tender's crashing into the car, or the car's hitting the tender, do you?

A. No, sir.

Q. There was a big noise when the automobile was thrown against the post?

A. Yes.

Q. That you did hear?

A. Yes, sir.

Q. And you were not looking forward during that time at all?

A. No, sir.

Q. When did they put the brakes on?

A. As soon as I hollered.

Q. You hollered just as the head of your train got on the crossing?

A. Yes.

Q. And you went how many feet after that?

A. Why. I should say 100 or more; a little over 100, perhaps.

Q. That is, the rear of your train was 100 feet from the crossing, or more?

A. Yes, sir; 100 or more.

Q. Then, who turned on the headlight?

A. The engineer.

Q. And that threw a light right back to the crossing?

A. Yes, sir.

Q. That threw a light over the crossing, didn't it?

A. Yes, sir; it would shine farther than the crossing.

Q. I say it threw a light—

A. Yes, sir.

Q. —right up across the crossing?

A. Yes, right straight through the crossing.

Q. Because that light is a strong light, isn't it?

A. Yes, it is a strong light.

Q. And do you remember his turning it on?

A. Yes, sir.

Q. Did you say anything to him?

A. I didn't say a word.

Q. Not a word?

A. No, sir.

Q. All you said was, when you got at the crossing—what was that you said to him?

A. I hollered, "Stop!"

[fol. 349] Q. "Stop!" Just like that?

A. Yes, sir.

Q. And nothing else?

A. I said something about a car hitting us, or something like that; but I don't remember just how I brought that out.

Q. What was that?

A. I said something about a car hitting us but I don't remember just how I brought that out. That was when it was over.

Q. You said that you were not looking when the engine hit the car?

A. I was not.

Q. But how do you know about a car hitting you?

Mr. Brumley: I object to that.

Q. How long did you stay up at the engine?

A. I stayed there until we left.

Q. How were you dressed?

A. I had an old pair of old overalls.

Q. What kind were they?

A. Striped—plain blue. Plain blue.

Q. Did you have a cap on?

A. Yes.

Q. Did you ever tell anybody that the automobile stopped?

A. No, sir.

Q. There were some newspaper men that came to see you?

A. No, sir.

Q. There were some newspaper men that came and talked to you?

A. No, sir.

Q. Didn't you ever see anyone from a newspaper?

A. No, sir.

Q. Didn't you ever see someone from a newspaper?

A. No, sir.

Q. Wait. You don't know what I am going to ask you. Didn't you ever tell someone from a newspaper that you were an eye witness to the accident? You said that Mr. Hoffman stopped his car?

Mr. Brumley: Wait a minute now.

The Court: Put your question. Do not answer. Go ahead and put your question.

[fol. 350] Q. You said that Mr. Hoffman stopped his car at the crossing and started to pass over the tracks. Did you ever tell that to any newspaper men or any representative of the press?

A. No, sir.

The Court: Go ahead and do not answer. Wait a minute. Strike out the answer.

The Witness: No, sir, I didn't.

The Court: I said "Do not answer."

Mr. Brumley: I object to that.

The Court: Are you going to produce a witness to contradict him if his answer is no?

Now you answer that yes or no.

Mr. Allen: No.

The Court: Then you are not entitled to put the question.

Mr. Allen: I don't know who the man is.

The Court: You are not entitled to put the question. Sustained.

Q. Do you know a Mr. Curtiss?

A. I know him by sight.

Q. Do you know him at all?

A. No, just by sight. That fellow is dead, I believe.

Q. What is that?

A. That fellow is dead.

Q. It is the man from the Metropolitan.

A. Yes, he is dead.

Mr. Allen: I suppose I cannot ask you that.

The Court: That is why I made Mr. Brumley produce the man in court that he was going to question about. It is his duty to produce that witness.

Q. Did you ever tell that to Sheriff Troy?

A. I never spoke to Sheriff Troy.

[fol. 351] The Court: Unless you are going to produce a witness to contradict him I do not allow questions to be asked. You both know that. You have been here before.

Mr. Allen: Very well, sir.

Q. How long after the accident did you get out of the engine?

A. It might have been a couple of minutes.

Q. Did you do anything about the lights at all?

A. No, sir.

Q. Before you got out?

A. No, sir.

Q. You say this light from the tender has a wire that runs around over the tender, does it?

A. Around the side of the tender, yes, sir (indicating).

Q. The side of the tender?

A. The top of the tender on the side along the edge of the coal boards.

Q. Along the edge of the coal boards?

A. Yes, sir.

Q. Was this wire out of order that night?

A. No, sir.

Q. Did you take notice of it?

A. Yes, sir.

Q. Where?

A. Down at Daly's.

Q. What made you take notice of it there?

A. I wanted to be sure that that headlight was lit after we started to back out.

Q. Did you turn it on then?

A. No, sir.

Q. Did the engineer ask you to look?

A. No, sir.

Q. You could tell if you turned it on, couldn't you, whether or not it worked?

A. You would have to see the reflection.

Q. What?

A. You would have to see the reflection from the light but you can't see the light from my side.

Q. You can't see the reflection, can you?

A. Yes, sir.

Q. Did you turn on the light first or did you go out and look at the light first?

A. I didn't turn the light on.

Q. Did the engineer turn the light on first or did you go out and look at the light?

A. I didn't go out and look at the light.

[fol. 352] Q. I thought you said you looked at it.

A. You don't have to look at it. You have to see the light on first. Otherwise there wouldn't be a reflection.

Q. Were you present when this photograph was taken of this engine, Exhibit F?

A. I don't remember.

Q. You don't know when it was taken, do you?

A. No.

Q. How long is that tender, do you know that?

A. About 20 to 22 feet.

Q. And how long is that engine?

A. 35 or 40 feet.

Q. About how long is the caboose?

A. Well, I don't know, 18 to 20 feet.

Q. Where is this bell or this socket for the light?

A. Right back of the engineer's feet.

Q. Back over his head?

A. Right here (indicating).

Q. Over his head?

A. Yes, sir.

Q. When was the bell shut off?

A. Why, just about when we—pardon me—came to a stop after the accident.

Q. You saw no other lights coming down this road except from this car?

A. No, sir.

Q. You cannot judge the speed of the car at all?

A. No, sir.

Q. You know it slowed down 15 to 18 feet away.

A. Yes, sir.

Q. I believe you told Mr. Brumley that the front of the tender was a little over the white line.

A. What do you mean?

Q. When the automobile was one or two feet back from the front part of the tender.

A. Yes.

Q. Then you were watching it then?

A. Yes, sir.

Mr. Allen: That is all.

The Court: All right, Mr. Brumley.

Mr. Brumley: That is all.

[Fol. 353] ERNEST L. BABB, called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

Direct examination.

By Mr. Brumley:

Q. Mr. Babb, where do you live?

A. I live in Great Barrington, sir.

Q. What is your business?

A. I am an automobile salesman in the garage of Garret F. Troy.

Q. For whom?

A. For Garret F. Troy.

Q. And Mr. Troy has a garage and sales place in West Stockbridge?

A. Yes, sir.

Q. And do you work in and out of West Stockbridge?

A. I do, sir.

Q. Have you any relation or relatives connected with the railroad company?

A. No, sir.

Q. Are you employed in any way by the railroad company?

A. Absolutely not; no, sir.

Q. On December 25, 1940, about 6 o'clock at night where were you?

A. I was in the garage office.

Q. And how far from the Main Street crossing is the garage office?

A. I never measured it but I would estimate somewhere around 150 feet.

Q. And is it on the left-hand side of the track or the right-hand side going north towards State Line?

A. Well, as we stand in the office and see that crossing at our right-hand side the crossing comes across and comes up past the garage, you see.

Q. Main Street goes that way?

A. Yes, and the Main Street crossing.

Q. Below the Main Street crossing is there another crossing known as Center Street crossing?

A. I don't know what they call it but there is another crossing down there, just a crossroad, a road going over the crossing.

Q. About 6 o'clock what were you doing?

A. I was standing in the office looking out the window.

[fol. 354] Q. And did you see a train go by?

A. I did, sir.

Q. In which direction was it going, toward State Line or away from it?

A. It was going toward State Line.

Q. About what time of the night was it?

A. I took no particular notice but it was probably between six and half-past—between 6 and 6:10.

Q. Did you see whether it was a long train or a short train?

A. It was a short train.

Q. Do you know whether there were any freight cars on it?

A. No, sir. I could see none.

Q. Was there any light on the train?

A. Yes, sir. There was.

Q. And where was the light?

A. On the tender end.

Q. Was the tender the first car on the train.

A. It certainly was.

Q. Did you hear any whistle for the Main Street crossing?

A. Yes, sir.

Q. What did you do or what did you hear?

A. Well, I heard a long blast continuously. It seemed to blow plenty.

Q. Did you see the train go over the Main Street crossing?

A. I did.

Q. Did you hear any more whistles?

A. Yes, sir.

Q. From that train?

A. Yes, sir.

Q. What did you hear?

A. I heard continuous blasts around the crossing as it goes up past the garage.

Q. What, about, was the speed of the train if you know?

A. Well, as near as I could estimate it might be between 10 and 15 miles an hour. It was traveling very slow.

Mr. Allen: It was what?

Q. It what?

A. Pardon me.

Q. In regard to the speed what did you say?

A. Between 10 and 15 miles an hour I would say.

[fol. 355] Q. Was anybody with you at the time?

A. There was another man in the office by the name of Mr. Sherrian.

Q. Sherrian?

A. Yes.

Q. Do you know how the name is spelled?

A. S-h-e-r-r-i-a-n I think is the way he spells it.

Q. Did you see the automobile when it was brought into the garage after the accident?

A. Yes, sir.

Q. When was it brought in?

A. It was brought in as soon as they could clear the wreck away after the accident. I don't know exactly how long.

Q. Did you see it after the accident?

A. I saw it landed up there after the accident. I saw it about the accident.

Q. Was it that night?

A. Yes, sir.

Q. I show you this Defendants' Exhibit D. Is that the condition of the automobile when it was brought in?

A. Yes, sir.

Q. Did you look at it?

A. I did, sir.

Q. I show you this small photograph and ask you whether that shows the center or Main Street crossing in West Stockbridge.

A. Yes, it does.

Q. Does it also show Troy's Garage which is beyond the crossing, just beyond the crossing?

A. Yes, sir, it shows up right up here (indicating).

Q. And that is where you were that night, is it?

A. Yes, sir.

Mr. Brumley: I offer that in evidence.

Mr. Allen: There is no objection.

(Marked Defendants' Exhibit 'I.)

Mr. Brumley: Would you like to see that, your Honor?

The Court: Turn it around.

Q. There is a gasoline sign on that photograph, isn't there?

A. Yes, sir.

[fol. 356] Q. Beyond the railroad.

A. Yes, sir.

Q. Is that the general location of Troy's place?

A. That is.

Q. Look at this photograph. It is over across the tracks, outside the tracks, is it? Is the garage outside the tracks?

A. Yes.

Q. Looking at this photograph? Looking at that photograph?

A. Yes, sir.

Q. The train that you saw that night came from the left of this photograph and went towards the right.

A. It came from the right of the photograph and went toward the left.

Q. It went toward the left?

A. Yes, sir.

Q. And could you see the light on the engine before it got to the crossing?

A. Yes, sir.

Q. The light on the tender.

A. Yes, sir.

Q. And did you watch it go over the crossing?

A. I did.

Mr. Brumley: That is all.

Cross-examination.

By Mr. Allen:

Q. Mr. Babb, on this Exhibit I, this road that is in the foreground is that also known as Albany Street? Is that the Albany Street road?

A. I believe that is what they call it.

Q. Is that the road that has got the Catholic church on it?

A. Yes, sir.

Q. As to the Elkey-Buckley Crossing, would that be to the left of that picture?

A. That would be to the left of our garage, yes, sir.

Q. Where is your garage? I want to find the garage in the picture.

A. It is a rather small photograph.

Q. Yes (handing to the witness).

A. May I show it to you?

[fol. 357] Q. Yes, I should like to see it.

A. Right there (indicating). You see where we have the windows here and we have a very large window on the side (indicating).

Q. All right, I am just asking where it was.

A. Yes, sir.

Q. This building here (indicating)?

A. Yes, sir, that is it.

Mr. Allen: Mr. Brumley, is that the way you understand that garage?

Mr. Brumley: Yes.

Q. On which side of the track is that garage, on the side to the right of the tracks or to the left?

A. Looking down toward the tracks?

Q. All right, you are looking down toward the tracks. Can you answer me? Which side of the tracks is it on, the right or left as you look on this photograph.

A. It would be on the left side.

Q. On the left side?

A. Yes.

Q. As to this cross arm that you see in the picture is that on the same side as your garage or is it on the opposite side?

A. It is on the same side of our garage.

Q. How many feet away from that track is that building which you say is a garage?

A. I would estimate somewhere around 150 feet.

Q. 150 feet?

A. Yes.

Q. As I look at this picture there are some other buildings that are over there and nearer, aren't they?

A. It doesn't show them in there.

Q. What is this here (indicating)? That is the building you say is a garage, isn't it?

A. Yes, sir.

Q. What is this to the right of it?

A. It is the same building. Maybe you are looking near the gas tank. You see, that is a pretty small photo.

Q. What is this thing back of this post, back of that telegraph post? Is that a building (indicating)?

[fol. 358] A. No, this is no building up there. This is your building up here (indicating).

Q. Where?

A. 150 feet from here (indicating).

Q. Is there anything between that and the railroad tracks?

A. No, sir, not to obstruct the view there is nothing.

Q. There is some pole there.

A. Well, there is telegraph posts.

Q. That is the front of your building on this Albany Street?

A. Yes, sir.

Q. This Albany Street runs right in front of the tracks and right in front of your garage, doesn't it?

A. Yes, sir.

Q. Then it goes up to the side of the pond, doesn't it?

A. Not the side of the pond. From our building it would be—we are on the side where the railroad is, you see.

Q. Doesn't that plan show that?

(Mr. Brumley handed a paper to Mr. Allen.)

Q. Look at Exhibit H and see whether you can find out where this Troy's Garage is from this Exhibit H.

The Court: This is your Center Street crossing so called and this is the crossing that your garage is at, the main street crossing, do you see? Now do you see the highway?

The Witness: Yes, sir.

The Court: Do you see the railroad track?

The Witness: Yes, sir.

The Court: Can you locate your garage? Don't mark it yet.

The Witness: I ain't going to mark it. We would be somewhere in here (indicating).

The Court: You would be somewhere in there (indicating)?

The Witness: Yes.

[fol. 359] The Court: All right, put an X on that. Make a big X for X-ray. Make a big X; don't be afraid. Somewhere in there put an X.

(The witness marked on the paper).

The Court: Put a circle around that X so that it will stand out. Which way was the train coming that you saw?

The Witness: The train was going this way (indicating).

The Court: Coming from the left-hand side of this map and going to the right-hand side; is that right?

The Witness: Yes, sir. It is towards State Line, isn't it?

The Court: Yes, this is towards State Line.

The Witness: Yes, sir.

Q. Then your building, as placed here with this X, is on the side of the town crossing nearer to the Elkey-Buckley Crossing; is that right?

A. It is not nearer. The Elkey-Buckley Crossing is—no, we are within 150 feet of this. The Elkey-Buckley Crossing is way ahead of us.

The Court: What he means is as the train passes that Main Street Crossing there it then passes your building, doesn't it?

The Witness: Yes, sir.

The Court: To go up to the Elkey-Buckley Crossing.

The Witness: Yes, sir.

The Court: In other words it goes 150 feet beyond the crossing towards State Line before it can pass your building.

The Witness: Right.

Q. Then your description of this picture could not be correct, Mr. Babb, because you said the road here in the [fol. 360] foreground is the road up toward the Catholic church and that your building was on the opposite side of the railroad track.

A. Then I mistold you there, because, you see, here is where the railroad goes, because I will show you how that is (indicating). Here is where the railroad crossing is. You can see where the train was from here away down to this bridge, and your engine goes up here and makes a slight turn right up past our garage.

Q. Is your building on the same side of the tracks that the Catholic church is on or is it on the other?

A. It is on the other side of the Catholic church.

Q. It is on the opposite side?

A. Yes.

Q. And the X that you put here on Exhibit H must be wrong, because this is the highway leading from the town crossing to the Buckley Crossing (indicating)?

A. Yes.

Q. And the church is on this highway, isn't it (indicating)?

Yes, on this side (indicating).

Q. And you have put your building on the same side as the church. Now I thought you just told me it was on the opposite side of the tracks from the church.

A. That's true, but your church is on the opposite side from us. Now, this is the highway (continuing).

Q. I am talking about the railroad tracks now. On which side of the railroad tracks?

A. We are on the opposite side of the railroad tracks.

The Court: Do you mean the church is on the opposite side of the highway but on the same side of the tracks?

The Witness: That's it.

Q. That is what you mean?

A. That's what I mean.

Q. Let us go back to this one (indicating). I can't get it straight. You tell me that the church is down on this road that is shown in the foreground.

A. No, sir. It is not.

[fol. 361] Q. It is not?

A. No, sir.

Q. It is above you?

A. Yes.

Q. Yes, on this road somewhere (indicating)?

A. Past our garage.

Q. Then this road that is shown is not the part of the

highway that is involved going from the town crossing past the Elkey-Buckley Crossing.

A. If it goes by our garage it is the same road that goes to the Elkey-Buckley Crossing.

The Court: He wants to know whether that is the same road that you see in the picture.

The Witness: Yes, sir.

The Court: On this picture. He may be pointing to more than one road.

The Witness: Not on this one (indicating).

The Court: Do you mean you know it is there but you cannot see it in the picture?

The Witness: Yes, sir.

Q. Is it on the same side of the tracks as this road or is it around on the other side of the tracks?

A. It is around on the other side of the tracks.

Q. It is on the other side of the tracks?

A. That's right.

Q. So, then, this picture doesn't show it.

A. No, sir. You can see the starting of it.

The Court: He knows it is true.

The Witness: It is on the opposite side of the tracks.

Q. Which way does your garage face, or Troy's Garage, that is, right out to the highway?

A. It faces right out to the highway.

[fol. 362] Q. And that highway makes a turn at this crossing, doesn't it?

A. A slight turn.

Q. A slight turn?

A. Yes, it curves right—

Q. It curves right around the railroad tracks doesn't it?

A. It goes right around and goes right up the railroad tracks.

Q. Where were you, in the front part of that building?

A. Yes, sir.

Q. On the ground floor?

A. Yes, sir.

Q. And as you looked up you would be looking down toward the Elkey-Buckley Crossing, wouldn't you?

A. No.

Q. You wouldn't be looking up past the town crossing, would you?

A. I would, certainly.

Q. Here is a picture, Plaintiff's Exhibit 4. Does that show your garage?

A. It goes right up by our garage. Here is our gas light right here, but you can't see the garage (indicating).

The Court: The Mobile gas sign is your sign?

The Witness: Yes, sir.

The Court: Where is that crossing?

The Witness: The crossing is down here (indicating).

The Court: The crossing is down near that building?

The Witness: Yes, sir, it is between this building and it is right in there (indicating). You can't see the crossing.

The Court: The Mobile gas sign is his sign and you cannot see the tracks or the crossing in this particular photograph marked "Plaintiff's Exhibit 4" (indicating).

The Witness: No, that is right.

[fol. 363] Q. Look at 5 (handing). Does that show your building?

A. Here is our Mobile sign way up here (indicating).

The Court: He is now looking at Plaintiff's Exhibit 5 and the Mobile sign is up on the left side of the picture.

The Witness: Yes, sir.

The Court: Which way were you looking?

The Witness: I was looking beyond the track, this way (indicating).

Q. Looking right straight up the crossing?

A. You can catch this train when she gets about here (indicating).

The Court: The Mobile sign is on Exhibit 5 and you were looking down toward the track.

The Witness: Yes, sir.

Q. That Mobile sign and your garage is 150 feet away from the track?

A. I should estimate about so.

Q. Yes, and this is down towards this highway; is that so (indicating)?

A. Yes, sir.

Q. You were looking at the front? You were looking out the front of the window toward the highway, were you not?

A. I was not at that time. I was looking through the end windows.

Q. What windows were you looking out?

A. Through the window from this end of the garage (indicating).

Q. This was about what time?

A. I would say between 6 and 6:10. I paid no special attention to the time.

Q. Who was with you?

A. Winthrop Sherrian.

Q. Was anyone else in the garage?

A. Not to my knowledge.

Q. Didn't some person come in there to ask you for some [fol. 364] thing?

A. Well, we had persons coming in and going out all the time. They may have.

Q. Do you mean they did that all the time?

A. Yes.

Q. Just before the accident didn't someone ask you for some dealer plates?

A. Not to my knowledge. They didn't ask me for any.

Q. They didn't?

A. No, sir.

Q. Didn't you go to get them?

A. No, sir, not to my knowledge.

Q. What were you doing?

A. I was standing there looking out the window.

Q. And were you talking to anybody?

A. Talking to Mr. Sherrian.

Q. What had you been doing in the afternoon?

A. Well, if it has any difference in the case I can still tell you. I might have been selling automobiles or I might have been talking to a lot of people during the afternoon.

The Court: What he wants to know is Were you doing business during the day.

The Witness: Yes, sir, I was.

Q. Automobile business?

A. Yes, sir.

Q. When did this other man come in?

A. What other man do you mean?

Q. The man you spoke to.

A. To Mr. Sherrian?

Q. Yes.

A. Mr. Sherrian was with me and he had been there—well, since 2 o'clock I would say that afternoon.

Q. Did you have any business with him?

A. He is a man that works in the office. We have a general business. We talk over things. We—

Q. He works there, too?

A. Yes, sir.

Q. What is his job?

A. Well, he is town clerk.

Q. I mean in the office what is his job.

A. He has his town clerk's office there and he works also for Mr. Troy.

[fol. 365]. Q. When did you go to stand at this window?

A. Well, I stand in the window a good many times when I am not doing anything.

The Court: No. He means that night what time did you go and stand in that window? How long were you there before you saw this train?

The Witness: Well, 6 o'clock.

The Court: Ten minutes?

The Witness: Well, we stood there probably ten minutes.

Q. You and Mr. Sherrian?

A. Yes, sir.

Q. You were just standing up in the window?

A. Yes, sir.

Q. What were you talking about there in particular?

A. Nothing in particular. Maybe he was reading the paper. I don't know. We often stand there and read the paper.

Q. Don't you sit down? Do you always stand up?

A. It just happened that night we were standing up. Other times we might sit down.

Q. Didn't anyone come in that night and ask for some dealer plates?

Mr. Brumley: I object to that as already answered.

The Court: Sustained.

Q. Does this highway in front of the garage cross the tracks at right angles?

A. No. It is a little diagonal.

Q. It is a little diagonal?

A. Yes, sir.

Q. And this window in this garage, how far back from the highway was that?

A. Our window?

Q. Yes; the window that you say you were looking through.

A. Why, I don't know; maybe 25, 30 feet from the highway.

[fol. 366] Q. That is the front of the building?

A. Yes.

Q. How far back—how far in from the front of the building is the window?

A. I don't get that. Put that again, please.

Q. The front of the building you say is about 25 feet from the highway?

A. Yes, sir.

Q. How far in from the building is this window that you say you were looking out; how far from the front of the building?

A. About 25 feet.

Q. Then the front of the building is 25 feet from the railroad track?

A. Oh, no.

Q. Then the window that you were looking out of is about 25 feet back of that; is that what you mean?

A. I beg your pardon; but you asked me from the road, not the railroad track.

Q. Then how far is the front of your building from the road?

A. About 25 feet from the road.

Q. Then how far back from the front is the window that you were standing at there?

A. The window is right at the front of the building.

The Court: How far from the front of the building? Does it come only up to the front or does it start back from the front? That is what he means.

The Witness: No, it is only up to the front.

The Court: You have got this window on the side, and then you have got this window (indicating)?

The Witness: Yes, sir.

The Court: It is a corner window like that?

The Witness: Yes, sir.

Q. Is that a single window or a double window?

A. It is a corner window.

Q. Do you mean two windows together?

A. Yes, yes. They come close together.

[fol. 367] Q. As you look down there you have your tanks, haven't you? You have your gas tanks? You have your gas tanks?

A. Yes, sir.

Q. What else is between you and the tracks looking down there?

A. Possibly one pole, if I remember right.

Q. As this railroad track comes up to the road does that come up at an angle?

A. A slight angle; yes, sir.

Q. That angle leads away from your store, from your garage?

A. Yes, sir; gradually going away from the store at an angle.

Q. Is there any street light between your garage and the track?

A. Yes; there is one on the crossing and one up near our place.

Q. You told Mr. Brumley that there was a long blast continuously; is that right?

A. Yes, sir.

Q. That is what you mean?

A. That is what I mean.

Q. Just one continuous blast?

A. That is all I observed; as I know they moved plenty—

Mr. Allen: I move to strike that out.

The Court: Strike out the "plenty".

Q. You are not interested in this, of course?

A. Not a bit.

Q. Just one continuous blast?

A. Yes, sir.

Q. How long before you saw that train did you hear that blast?

A. Well, probably 30 seconds or so.

Q. 30 seconds before you saw the train you heard this blast?

A. Yes, before they came across the crossing.

Q. And that continued for 30 seconds; is that right?

A. It continued right up by that crossing.

Q. Right up by that Main Street crossing; is that right?

A. Yes, sir.

Q. And did it continue on after that?

A. It did. After it went up the curve.

Q. It kept on? You could hear that?

A. You could hear the whistle.

[fol. 368] Q. One long continuous blast?

A. Well, that is my estimation of it.

Q. How long did it continue after the train passed you?

A. Well, it goes around 'way——

Q. How long did it continue, that you heard? You say you heard it for 30 seconds until that train came in sight?

A. Yes, sir.

Q. How long after the train had passed did it continue?

A. Well, it continued——

Q. In your judgment.

A. I would say another minute.

Q. Another minute?

A. Yes, sir.

Q. Just that one long blast?

A. That is all I could judge.

Q. Did you hear it after the one long blast?

A. I heard it as it blew; yes, sir.

Q. How long did you hear it?

Mr. Brumley: Wait a minute. The witness ought to be allowed to answer.

The Court: He said Yes.

Q. How long after that did you hear it?

A. I wouldn't be able to tell you the time.

Q. How many seconds? You have given half a minute after you first heard it and said that it kept up after it passed you. How long after you heard it first did you hear it again after that?

A. I guess another 30 seconds.

Q. Another 30 seconds?

A. Yes.

Q. Then how long did you hear it?

A. I couldn't hear it any longer after it got out of my hearing.

Q. You said you heard it first before you saw the train for 30 seconds?

A. Yes, sir.

Q. Then you heard it a minute after that? That makes I think a minute and a half of just a continual blast?

A. Yes, sir.

Q. I believe you said you heard it again?

A. Yes, sir.

[fol. 369] Q. Did you hear it again?

A. Yes, sir.

Q. Was that one blast?

A. It sounded like another long blast.

Q. How long did you continue to hear that one long blast?

A. Well, I couldn't say no more than another 30 seconds.

Q. Another 30 seconds; is that right?

A. Yes.

Q. You didn't hear any bell?

A. I took no particular notice of a bell because the whistle was blowing, and you can't hear the bell when the whistle is blowing.

Q. Of course there was nothing particularly to attract your attention to the train that night?

A. Nothing at all. There was nothing unusual about it.

Q. You say it was going between 10 and 15 miles an hour?

A. Yes, sir.

Q. You told Mr. Brumley that you went down to the scene of the accident?

A. Yes, sir.

Q. What time did you get down there?

A. Well, I should say it was around 6:15.

Q. Who was with you?

A. Why, I went alone, sir. I think I went alone, sir.

Q. Was anyone with you at all?

A. No; I think I took a car and went myself. Mr. Sheridan had to stay in the office.

Q. What car did you take; a station wagon?

A. No, sir. In the first place I took one of our used cars.

Q. Did you put some dealer plates on it?

A. They was already on there.

Q. Did somebody come in and ask you to put those plates on the car?

A. No, sir; to my recollection.

Q. Do you know Arthur Gennari?

A. I do, sir.

Mr. Allen: Is Arthur Gennari here?

(A man stood at the rear of the courtroom.)

Q. That is Arthur Gennari (indicating)?

A. Yes, sir.

[fol. 370] Q. Did you see him that night?

A. I don't remember whether I did or not.

Q. Will you say you didn't see him?

A. I wouldn't say I did nor I wouldn't say I didn't.

Q. Didn't he come into the garage that night before this accident?

A. If I remember correctly I think I sold him an automobile that day.

Q. Did he come into the garage before this accident that night, just shortly before the accident?

A. I don't remember, sir.

Q. Would you say he didn't?

A. I wouldn't say he did or he didn't; I just don't remember.

Q. Didn't he come in and ask you for some dealer plates?

The Court: We have spent ten minutes on this. I do not see the connection at all. I have been very tolerant with you men. You cannot stray off the cross-examination. As a matter of fact, we have been one hour with this witness on the cross on totally unrelated matters to the accident. I am going to hold you to the proof.

Mr. Allen: I am sorry, your Honor.

The Court: Go ahead. I do not see the relation but maybe you have something and I don't know what it is.

Q. Didn't he come in there for dealer's plates?

A. I told you I don't remember it.

Q. All right. Now, when you went down to the place of the accident they were working there to get the two persons out, were they?

A. There had nobody started to get the people out. Someone had got the girl out but when I got there, there was—

Q. They were working with flashlights?

A. Yes, sir; they were seeing what they could do.

Q. You knew the people that were working around there?

[fol. 371] A. I don't know as I knew anybody. I took no notice. What probably happened was—

Q. How long did you stay there?

A. I was probably there about three minutes.

Q. Didn't you go down with Arthur Gennari and bring the woman's body back to Troy's Garage?

A. No, sir. Arthur Gennari wasn't with me when I brought the woman's body back to Troy's Garage.

Mr. Allen: That is all.

Redirect examination.

By Mr. Brumley:

Q. Mr. Babb, I show you this photograph again, Defendant's Exhibit D, and ask you whether you noticed that glass in the left-hand front window the night the automobile was brought into the garage?

A. Yes, sir. That window—

The Court: No, no. That is your question and you have answered it.

The Witness: Yes, sir.

Q. And was that glass as shown in the photograph?

A. Yes, sir.

Q. Let me have that back, please.

A. (Photograph handed to counsel.)

Q. Showing you this Plaintiff's Exhibit 5, which you have already seen, did you hear the whistle blown after the train had gone over this crossing (indicating)?

Mr. Allen: I object. This was already answered on direct and cross.

The Court: Yes; sustained.

Mr. Brumley: I was trying to bring out to him, Judge, what it was on the Court's comment.

[fol. 372] The Court: I think you can forget the comment. When I charge the jury I am going to have nothing whatever to say about the whistle at that crossing, you see.

Mr. Brumley: I am trying to bring out that he heard the whistle after it had gone over the crossing.

The Court: I am afraid you did not follow what he said. He said after it got out of sight he didn't hear any more whistles.

Isn't that what you said?

The Witness: Yes.

Q. Did you hear this train going over this crossing?

A. Yes.

Q. This is the town crossing?

Mr. Allen: I object.

The Court: Yes. It opens up the door to more cross-examination on what you bring out and then we will be here all day. You are entitled to examine on what has been brought out on cross-examination and then stop.

Mr. Brumley: I should like to bring this out:

Q. Did you see the train go over the town crossing?

A. Yes, sir.

Mr. Allen: I object to that.

Q. Did you hear the whistle of the train blow after it had gone over the crossing?

A. Before it got to the crossing.

Q. And did you hear it blow after it had gone over the crossing?

A. Yes, sir.

[fol. 373] Mr. Brumley: That is all.

The Court: Gentlemen, would you like to come back at a quarter to two, instead of two o'clock? You see, that will give us an extra fifteen minutes. A quarter to two, instead of two o'clock.

(Recess until 1:45 P. M.)

Afternoon Session—1:45 P. M.

HENRY R. HUNT, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Brumley:

Q. Mr. Hunt, what is your work?

A. Certified shorthand reporter.

Q. Where do you work?

A. 154 Nassau Street, New York City. I have an office there.

Q. And do you take official court notes?

A. I do.

Q. In what courts?

A. Well, I am a free lance, but I have worked in this court and in the Supreme Court, before the Federal Grand Jury

in the Southern District, in the Federal Court down in Miami, Florida, and at the present time I am working in the Compensation Court over in New Jersey.

Q. Did you go with Mr. Helfrich of the New York-New Haven Railroad to West Stockbridge?

A. Yes, I did.

Q. And did you take shorthand notes of Lawrence Michael Bona's statement?

A. Yes. Mr. and Mrs. Bona were interviewed at the same time, if I recall correctly.

Q. I ask you whether you will refer to your original notes and whether your notes show that Mr. Helfrich asked these questions of Mr. Lawrence Bona and whether he made these [fol. 374] answers: "Q. But you wouldn't say the train didn't whistle before it got to the crossing? A. No, sir. I wouldn't say whether it did or not." I call your attention to page 55, I think, of your notes.

A. 55—how does that question start: "But you wouldn't say the train didn't whistle before it got to the crossing? A. I wouldn't say whether it did or didn't?"

Q. Yes. Now I ask you whether your notes show this question asked the same witness and this answer, on page 56 of your notes: "Q. From where you were in West Stockbridge would you say the train didn't whistle at any time from the time it went through West Stockbridge until the time of the accident? Mr. Bona: I couldn't either."

A. Yes, that is right; but there is an intervening remark in there.

Q. Yes.

A. (Continuing:) Which ties up with that. Mr. Bona said—

Q. Never mind. I will come to that. But he did make that answer?

A. "I couldn't either," was his answer.

Q. With that same witness was this question asked and was this answer made: "Q. Did you hear the crash between the train and the car? Mr. Bona: No, I didn't hear no crash or anything." I call your attention to page 64 of your notes.

A. "Q. Did you hear the crash between the train and the car? Mr. Bona: No, I didn't hear no crash or anything."

Q. I call your attention to page 71 of your notes and ask you whether this question was asked and this answer

given by Mr. Bona: "Mr. Helfrich: You had all the windows closed when you went by the church. That is when you started to open the windows? Mr. Bona: Yes."

A. Wait a minute.

Q. Page 71 of your notes.

A. I have here: "You had all the windows closed when you went past the church." Then there is a remark by [fol. 375] Mrs. Bona. That is right. Then there is another question: "That is when you started to open the windows? A. (By Mr. Bona.) Yes."

Q. And then just beyond that on page 72 of your notes—or, rather, on the same page—this question: "Q. Up to that time all the windows in the car were closed? Mr. Bona: Yes."

A. That is right. I have—

Q. Then on page 72 of your notes I call your attention to that page and was this question asked by Mr. Helfrich of Mr. Bona: "Q. You were thinking more about your rear end trouble than you were about the railroad track? A. That is it."

A. It should be, "The railroad train."

Q. Yes: "You were thinking more about your rear end trouble than you were about the railroad train? A. That is it."

A. That is right.

Q. Also on the next page: "Q. In other words, the noise of your car and thinking of your own troubles took your mind entirely off anything that was going on on the railroad tracks? Mr. Bona: Yes. When you see trains you don't stop to listen to what they are doing."

A. That is right. There was an intervening remark, of course, by Mrs. Bona, in there.

Q. Then on your page 73 does this question appear: "Q. When you are having troubles like you were having you are kind of mad about having hard luck and you are paying more attention to that than to anything on the railroad?"

A. That is right.

Q. And the answer is "Yes"?

A. Yes.

Q. Did he make that answer to that question?

A. That is right.

Q. And then on the same page: "Q. You were not listening for bells or whistles at that time, were you? Mr. Bona: No."

A. "Q. You were not listening for bells or whistles at that time, were you? A. No." That is right.

Q. And then on page 73 still: "Q. You were thinking about your rear end troubles; is that it? Mr. Bona: That is it."

A. That is right.

[fol. 376] Q. On your page 45 was this question asked: "He said he stopped for the crossing? A. He said he stopped for the crossing."

Mr. Allen: One moment. Are you finished?

Mr. Brumley: No.

Q. "A. He said he stopped for the crossing and what he saw was the back of the train and thought the train was going by and he started—thought the train was gone by—"

Mr. Allen: I am going to object to this question:

Mr. Brumley: That was allowed before, your Honor.

Mr. Allen: I am going to object to this question on the ground that whatever information was elicited from Mr. Bona was direct examination by Mr. Brumley and nothing connected with the examination in chief of the witness and therefore he is bound by his answers.

The Court: I don't think so. I will allow it.

Mr. Allen: I respectfully except.

Q. I will repeat that: "Mr. Helfrich: He said he stopped for the crossing? Mr. Bona: Yes. He said he stopped for the crossing and what he saw was the back of the train. He thought that the train was gone by and he started up and it hit him and that is all he could remember. He was in tough shape." A. That is right.

Q. And then again: "Mr. Helfrich: So he claims he stopped for the crossing and saw the back of the— Mr. Bona: —train."

Mr. Allen: Same objection, your Honor.

The Court: Same ruling.

Mr. Allen: Exception.

[fol. 377]. Q. Is that right?

A. "So he claims he stopped for the crossing and saw the back of the— Mr. Bona: —train."

Q. Yes.

A. Yes; and then the question is continued.

Q. Mr. Helfrich: —engine, and thought it was going in the other direction? Mr. Bona: Yes."

A. That is right.

Q. "Mr. Helfrich: And then he started up? Mr. Bona: Yes. And then started. That's all he could remember."

A. That is right.

Mr. Allen: Same objection.

The Court: Same ruling.

Mr. Allen: Exception.

Q. If you will refer to the testimony of Arthur Paul Bona, page 184 of your notes—

A. Yes, sir.

Q. Did you also take stenographic notes of the conversation between Mr. Arthur Paul Bona and Mr. Helfrich?

A. I did.

Q. And was this question asked by Mr. Helfrich and was this answer made by Mr. Bona: "Q. And did you hear the train whistle for the crossing? A. Yes."

A. That is right. It should be "for that crossing."

~~Q. "Did you hear the train whistle for that crossing?~~
A. Yes. Q. Did it whistle for the first crossing? A. Yes."

A. That is right.

Q. "Q. You are sure about that? A. Yes. Q. Do you remember how it whistled? A. I don't remember."

A. That is right.

Q. "Q. Whether it was long whistles or short whistles? A. I know I heard it."

A. That is right.

Q. If you will refer to page 186 of your notes: "Q. Were you listening for it," (that is, referring to the train whistle)? "A. I was not paying such attention to it because I was not driving. You can ask my brother and perhaps he can give you further details."

[fol. 378] A. Well, part of that is a reference by the attorney. The question is, "Were you listening for it?"

Q. Oh, yes.

A. And then referring to the—

Q. The question was, "Were you listening for it?" I put in something there.

A. That is right.

Q. "A. I was not paying much attention to it because I was not driving. You can ask my brother and perhaps he can give you further details."

A. That is right.

Q. On page 188 of your notes: "Q. Did you hear the crash between the train and the car? A. No, I didn't."

A. Right.

Q. "Q. You are sure you didn't hear the noise of the crash? A. No, I heard the train go by."

A. That is right.

Q. "Q. You don't remember hearing any crash or any unusual noise on that crossing? A. No, not unusual."

A. That is right.

Q. On page 189 of your notes do they show this: "Q. Or any unusual noise on the crossing? A. We heard the train. We were expecting it but I was not expecting that whistle and I didn't hear it."

A. That is right.

Q. "Q. But you didn't hear the crash between the car and train? A. What let us know that the train was nearby was a light."

A. Correct.

Q. "Q. A light? A. Yes; some kind of light shining from the train. That is how we knew it."

A. That is right.

Q. One more now from the last Bona on page 185 of your notes: "Q. Did you hear this car"—that is referring to the Hoffman's car—"Did you see this car at any time before the accident? A. Oh, yes."

A. That is right.

Q. If you will turn to your notes on Mrs. Lawrence Bona—

A. That is Mrs. Lawrence Bona, isn't it?

Q. Lillian Hazel Bona.

A. I guess I have—

[fol. 379] Mr. Allen: Well, she is Mrs. Lawrence Bona.

A. (Continuing.) O. K.—Lawrence—I didn't know her first name.

Q. You also took notes of questions asked her and answers that she gave?

A. Yes; at the same time with Mr. Bona.

Q. Referring to pages 55 and 56 of your notes: "Q. Did Mr. Helfrich say this to you, as well as to your husband, who was"—wait a minute. I don't want that. That is in the record.

A. That is in the record.

Q. That is my question.

A. That is your question.

Q. "Mr. Helfrich: But you wouldn't say the train didn't whistle before it got to the crossing?"

A. That is right.

Q. And then: "Answer: No."

A. No—there are several intervening remarks by Mr. Bona.

Q. Then does Mrs. Bona, in answer to that question, according to your notes, say this: "I would say the same. I couldn't say whether it did or whether it didn't."

A. That is right.

Q. On page 56 of your notes: "Q. From where you were in West Stockbridge would you say the train didn't whistle at any time from the time it went through West Stockbridge until the time of the accident? A. I wouldn't say."

A. That's right.

Q. And then on page 57 of your notes: "Q. From where you were in West Stockbridge would you say the train didn't whistle at any time from the time it went through West Stockbridge until the time of the accident? A. I wouldn't say."

A. And then there was an intervening remark by Mr. Bona, and then Mrs. Bona continued.

Q. Did Mrs. Bona continue and say: "I wouldn't put my foot in and say it didn't"?

A. Well, "it didn't and it did."

[fol. 380] Q. "And it did"?

A. Yes.

Q. Now, going to the testimony of Edna Lena Bona on page 178 of your notes, did you take stenographic notes of the conversation between Edna Lena Bona and Mr. Helfrich?

A. Yes, I did.

Q. Was this question asked and did she make this answer: "Q. Did you hear the crash? A. My brothers did. I was too busy screaming, I guess."

A. That is right.

Q. "Q. What do you mean, 'screaming'?" A. I hollered because I saw the train coming down. I saw the train coming down, and I always was scared of trains, and I hollered to my brother to be careful."

A. That is correct.

Mr. Brumley: That is all.

Cross-examination.

...By Mr. Allen:

Q. Mr. Hunt, I don't think you were asked when you took these notes.

A. It was in July. My notes show July 10, 1941, and also July 11th. I know we stayed overnight.

Q. When you say "we", whom do you mean as "we"?

A. Mr. Helfrich.

Q. Was there anyone else?

A. That was all; just the two of us.

Q. And had you done work for Mr. Helfrich before?

A. No. That was the first time I had worked for them. In fact, I have only done one other job; two altogether.

Q. And you went up from New York with him, up to West Stockbridge?

A. That is right.

Q. And do you recall where you went first?

A. Yes. We went to Stockbridge, and after taking a room at the hotel we went out to the railroad crossing to see a girl by the name of Gennari.

[fol. 381] Q. Norma Gennari, who lived right by the railroad crossing?

A. She was the first one we saw that night.

Q. That was the night of the 10th of July?

A. The 10th; that is right.

Q. And then after going to the crossing and seeing Miss Gennari, where did you go?

A. We went from there to see Mr. and Mrs. Bona, up in a place called Farnham, I think.

Q. Farnham?

A. Yes.

Q. And who else was there at Farnham besides Mr. and Mrs. Bona, that you interviewed?

A. Just the two of them. We went into their living room.

Q. In this statement from the others, Edna Bona and Arthur Bona, that was taken the next day?

A. The next day; that is right.

Q. When you went to Mr. Bona's home in Farnham, about what time was it?

A. It must have been I would say about 8:30. I know it was after dark. We had spent some time with Miss Gennari, and it was a 20-mile drive, or something like that.

Q. Yes; and did you have some books there that you wrote in? Did you have the same books there that you had when you went to Miss Gennari?

A. Yes, I did. They are both in the one book.

Q. And how long did this interview take place with Mr. and Mrs. Bona?

A. Oh, I would say half an hour; three-quarters, maybe.

Q. I notice when Mr. Brumley started to ask you questions he cited certain pages of your notes.

A. That is right.

Q. That is because you and he had checked that?

A. That is right. We had done that just before the afternoon session.

Mr. Brumley: Through the lunch hour.

[fol. 382] Q. The first question was on page 55 of your notes?

A. Yes, sir.

Q. How many pages ahead of that have you of your examination of Mr. and Mrs. Bona?

A. The Bonas? I think it begins on page 39.

Q. Page 39?

A. That is right.

Q. And the examination of Mr. and Mrs. Bona runs from page 39 to what in your book?

The Court: You have got an index, haven't you?

The Witness: No, I haven't, sir. There were 120 witnesses, or something like that, examined this time, and I just have it as the New Haven case. There is an index in the minutes. Well, here it is, to page 73.

Q. It ends at page 73?

A. Yes.

Q. So the examination of Mr. and Mrs. Bona as taken down in your stenographic notebook is from page 39 to 73?

A. Correct.

Q. And you have been asked certain specific questions by Mr. Brumley from that examination?

A. That is right.

Q. About how many typewritten pages does that 39 to 73 pages of stenography represent? You have written it out, haven't you?

A. It is about 25 pages, I would say, roughly.

Q. 25 pages?

A. Yes.

Q. I suppose Mr. Helfrich was asking all the questions?

A. Yes; exactly.

Q. You didn't ask any?

A. No, sir; no.

Q. The next one you interviewed after Mr. and Mrs. Bona was whom?

A. Well, the next day; the first one we interviewed the next day, July 11th, was Garrett F. Troy.

The Court: No. He means of the Bonas.

[fol. 383] Q. Of the Bonas.

A. Of the Bonas? Just a minute. I think it was Edna Lena Bona.

Q. What page does her examination begin on?

A. It begins on page 176 and runs through, I think, to 184. Then Arthur Bona was next.

Q. I didn't get you. 176?

A. 176 to 183.

Q. To 183?

A. Yes.

Q. And then Arthur was from pages what?

A. 184 to 192.

Q. Did you ever see any of the Bonas again after that?

A. No.

Q. Turn to your page 45, will you, please?

A. Yes, sir.

Q. I think in answer to one of Mr. Brumley's questions, a part answer of one of the Bonas,—I think it was Lawrence,—said, "He was in tough shape"?

A. That is right. He ended up by saying, "He was in tough shape."

Q. After you had taken these notes did you read them back to any of the parties, Mr. and Mrs. Bona?

A. No, I didn't.

Q. Or Lena or Edna or Arthur Bona?

A. No, I didn't; none of them.

Mr. Allen: That is all.

Redirect examination.

By Mr. Brumley.

Q. You have done work at times for Mr. Allen, too?

A. I have.

The Witness (addressing Mr. Allen): I don't know whether you recall it, but I believe you were interested in a case in connection with a boy who had dived into a swimming pool in St. Petersburg, Florida.

Mr. Allen: Florida? Did you take the testimony?

The Witness: Of some doctor uptown.

Mr. Allen: Oh, yes. I did not remember you.

Mr. Brumley: That is all.

Mr. Allen: That is all.

[fol. 384] LEO LAWRENCE JOHNSON, called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

Direct examination.

By Mr. Brumley:

Q. Mr. Johnson, where do you live?

A. I live on—well, my home is in West Stockbridge, Massachusetts, but I live in New Canaan, Connecticut.

Q. Where do you work?

Mr. Allen: Speak a little louder, please.

A. I am an office clerk for the New England Light Company at Caanan, Connecticut.

Q. You are a brother of Conductor Johnson?

A. Yes.

Q. And on the afternoon of December 25, 1940, were you at Conductor Johnson's home?

A. Yes..

Q. What time did you get there?

A. Well, I went home the night before, Christmas Eve.

Q. And in the afternoon around 6 o'clock where were you?

A. I was in the living room of my house in West Stockbridge.

Q. And your sister's name is what?

A. I have one sister, Katherine Johnson.

The Court: No,—the one who was home that day.

The Witness: That is Rose, your Honor.

The Court: The one that testified here; is that right?

The Witness: Katherine, your Honor.

Q. Katherine Johnson was in the house at that time?

A. She was lying down upstairs.

Q. What were you doing?

A. I was in the living room.

Q. And did you hear any train or whistle?

A. Yes. I heard the train coming, because I was waiting to go—

[fol. 385] Mr. Allen: I object, your Honor.

The Court: Strike it out. You heard the train coming in?

The Witness: Yes, sir.

Q. What did you hear?

A. Why, I heard a whistle at the rear of my house and I got up from the living room and went into the kitchen.

Q. Yes?

A. And watched the train go by. I was expecting a signal from my brother.

Mr. Allen: I move that the latter part be stricken out.

The Court: Strike that out.

Q. You went from the living room to the kitchen, did you?

A. Yes, sir.

Q. What did you hear or see?

A. Well, when I went to the kitchen window I saw the train coming toward State Line. There is—the tender part of the engine had passed the corner.

Q. Had passed what?

A. A curve on the track—a curve; and I saw the front part of the engine and the caboose.

Q. Did the train have any light on it?

A. I couldn't see the light on the tender but I saw the reflection of the light after it passed that curve back of the church.

Q. And then what happened?

A. I immediately went back into the living room and took my coat and hat and went to State Line.

The Court: What did you go there for; to meet your brother?

The Witness: To meet my brother.

The Court: You took a car?

The Witness: I took his car; yes, sir.

[fol. 386] The Court: And you drove to State Line?

The Witness: Yes, sir.

Q. When you were in the house were you waiting to go for your brother?

A. Yes, sir.

Q. And you didn't know that there had been a collision?

A. No, sir; not until I had reached State Line.

Q. Did you notice about how fast the train was going?

A. Well, it appeared to be going very slowly, to me. I wouldn't say between 10 and 15 miles an hour.

Q. Your home and your brother's home is on what street?

A. Well, it is on Albany Road, on Route 41.

Q. In reference to the Catholic Church, where is it?

A. Why, it is on the same side as the church, I should say about 400 feet south of the church.

The Court: Is it near the Buckley crossing?

The Witness: No; south of it.

The Court: Farther away?

The Witness: Yes; nearer Main Street.

The Court: So you were about 1600 feet from the Buckley crossing?

The Witness: That is right.

Mr. Brumley: That map—

The Court: We have got that house located on the map. I appreciate that.

How far is the back of your house from the track?

The Witness: I should say approximately 200 feet.

The Court: 200 feet?

The Witness: Yes.

Q. Between your house and the track is there any pond?

A. Yes, there is a small pond called Pope's Pond.

Mr. Allen: Called what?

The Witness: Pope's.

[fol. 387] Q. After you saw the light or the reflection of the light on the train did you hear any whistle?

A. I heard the whistle after it had passed the curve.

Q. When you say "the curve", what do you mean?

A. Well, at the time that I was looking out, there is an angle on the railroad track that goes in back of the church.

Q. Yes. And what?

A. And that is where I saw the reflection of the light and the whistle—and heard the whistle.

Q. When did you learn that there had been an accident?

A. After I reached State Line. I imagine I had been at State Line about five minutes.

Q. Did you go back to the scene of the accident?

A. No, I didn't.

Q. Did you ever work for the railroad?

A. At one time in 1929 I worked three months; that is all.

Q. And you haven't worked since?

A. No, sir.

Mr. Brumley: That is all.

Cross-examination.

By Mr. Allen:

Q. Mr. Johnson, you say that after you had heard the whistle and seen the reflection you left the house; right?

A. Yes.

Q. And you got your car?

A. Yes, sir.

Q. And you went to State Line?

A. Yes, sir.

Q. Did you use this Route 41?

A. No, sir.

Q. How did you go?

A. Well, I went on the new road—there is another road that goes to State Line.

Q. You had to come down on this Albany Road, or Route 41, for some distance, hadn't you?

A. No; I am on Route 41.

Q. Well, when you got your car you brought it out on Route 41?

A. Yes.

Q. Which way did you go; to the north or to the south on Route 41?

A. I went to the south.

[fol. 388] Q. That is up toward the town crossing?

A. Up toward the town crossing.

Q. The town crossing?

A. Yes.

Q. And when you came back did you come back the same way?

A. I did.

Q. I believe you said you were sitting in the living room?

A. Yes.

Q. That is in the front of the house on Albany Street?

A. Yes, sir.

Q. And did you then have the windows closed?

A. Yes, sir.

Q. In your house or the place where your house is, is elevated above the tracks somewhat?

A. Yes, sir.

Q. How many feet?

A. Well, I don't know. It is about—

Q. 10 to 15 feet?

A. No; it is more than that.

Q. 20 feet?

A. It—well, I couldn't say.

Q. That is, the plot of ground runs from Albany Street to the railroad; is that right?

A. No. That is where the house is located, on Albany Street.

Q. Yes; and did your plot of ground run from Albany Street back to the railroad track?

A. Yes.

Q. And that is elevated quite a few feet above the tracks?

A. The tracks; that is right.

Q. Couldn't you give your best estimate of how high up it is?

A. Well, I don't know just what you mean,—how high above the track?

Q. Yes; that is right. 15 feet?

A. Oh, it is more than that; I should say.

Q. 20, 25 feet?

A. It is all of that.

Q. All of that?

A. Yes, sir.

Q. All of that, anyway?

A. Yes.

Q. What was the first thing that attracted your attention?

A. Well, I heard the whistle.

Q. The whistle? What kind of whistle did you hear?

A. Well, a sharp, long whistle I heard.

[fol. 389] Q. That is all you heard?

A. Yes.

Q. Just one whistle?

A. No. It seemed to be a prolonged whistle. That is all I heard.

Q. That is all you heard,—a prolonged, long whistle?

A. Yes.

Q. When you heard that, then what happened?

A. Well, I went to the kitchen.

Q. You went to the kitchen?

A. Yes.

Q. Did you go outside at all?

A. Not at that time; no, sir.

Q. When was it you say you saw a reflected light?

A. After the train had passed in the rear of the church.

Q. The church was 400 feet from you up toward the Elkey-Buckley crossing?

A. Yes, sir.

Q. And that is also up on an elevation above the track 20 to 25 feet?

A. Yes. That is about the same elevation.

Q. And from where you were inside your house 200 feet away from the railroad tracks you say you saw a reflection down in the cut 20 feet above this light?

A. I didn't say that. I said I saw the reflection on the top of the bank.

Q. On top of the bank?

A. Yes.

Q. Do these lights go up or down?

A. You can see the reflection of the light on top of the bank in the rear of the church.

Q. Where was that reflection in regard to the church?

A. Well, it was in the rear of the church on the bank—next to the bank.

Q. 400 feet to your left?

A. All of that.

Q. All of it and farther; right?

A. Yes.

Q. How much farther?

A. Probably 700, 800 feet.

Q. And this train was then some 25 to 30 feet below the level where the church was?

A. Yes, sir.

Q. You didn't hear any bell?

A. No, I didn't hear any bells.

Q. You didn't hear any crash?

A. No.

[fol. 390] Q. Your windows were all closed?

A. Yes, sir.

Q. Did you hear the train itself?

A. No, I couldn't say I could hear the train. I just watched.

Q. But when you heard this sound of this whistle, this one long whistle—

A. Yes.

Q. —did that appear to be to your right or to your left?

A. Well, it appeared to be directly in back of my house.

Q. Directly in back of your house?

A. Yes.

Q. You didn't see the train at all?

A. Yes, I saw the train.

Q. When did you see the train?

A. I saw the train after it had passed my house before it turned that corner and before it came to the rear of the church.

Q. You didn't go out of your house?

A. No, sir; I didn't have to.

Q. I thought you said the church is some 20 to 25 feet above the tracks.

A. Yes.

Q. How could you see the train?

A. There is no embankment from the rear of my house to just a point south of the house. That is on the pond.

Q. I thought when you saw it it was behind your house.

A. No. It is in the back. It is elevated from the bank, but between where I saw the train and the track is the pond.

Q. Was it directly in back of your house when you saw it?

A. No, it was past me.

Q. It was past you?

A. It was past my house.

Q. How far past your house?

A. Oh, I should say 400 feet.

Q. Do you say with that train 400 feet past you, you estimated its speed at 10 to 15 miles an hour?

A. I knew it was going very slow.

Q. Do you remember that you told Mr. Brumley that you estimated its speed at 10 to 15 miles an hour?

A. Yes, sir.

[fol. 391] Q. All you saw was the tail end of that train 400 feet away; is that right?

A. No. I saw the engine. I didn't see the tender part of the train. I saw the engine and caboose.

Q. It was about 400 feet to your left?

A. Yes.

Q. When you saw it for the first and only time?

A. Yes.

Q. But you estimated 10 to 15 miles an hour was its speed?

A. Well, I knew it was going very slow.

Q. And you estimated 10 to 15 miles an hour?

A. Yes.

Q. Did you see any light shining back from that train?

A. No, I didn't.

Mr. Allen: That is all.

The Court: That is all. You may step down.

Mr. Brumley: That is all. Thank you very much, Mr. Johnson.

RICHARD JAMES O'BRYAN, called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

Direct examination.

By Mr. Brumley:

Q. Mr. O'Bryan, where do you live?

A. Farnams, Massachusetts.

Q. What is your business?

A. I work for the United States Gypsum Company at Farnams.

Q. Are you a brother-in-law of Amenio Selva?

A. I am, sir.

Q. You married his sister?

A. That's right.

Q. On December 25, 1940, were you at the Selva home?

A. I was, sir.

Q. Where is that home or house?

[fol. 392] A. I think they call the street Mechanic Street. It runs off of Route 41 directly across from the south end of the Catholic church.

Q. The road leading to that house is on the other side of Route 41 from the Catholic church; is that right?

A. Yes, sir.

Q. And about how far is the house from Route 41?

A. I would say it was 500 to 600 feet.

Q. And would you say that the house was about opposite the Catholic church about 400 or 500 feet back of the roadway?

A. It is not opposite the roadway; it is—as the street branches off of Route 41 it takes a turn to the left—that would be to the south. I would say that the house is perhaps 150 feet from a point opposite the Catholic church.

The Court: It is all algebra to me and I am sure it is to the jury, Mr. Brumley.

Mr. Brumley: I will try to straighten that out.

The Court: What is the purpose of this? What is this witness going to testify to? Why don't we get what he is going to say and then we will see whether it has any relation to this? I don't know.

Mr. Brumley: I am trying to find out where he was at the time.

The Court: He says he was in the house.

Mr. Brumley: I am trying to bring out where the house was. I thought we might be interested to see.

The Court: Route 41 runs from the town to this Buckley Crossing.

The Witness: That's right.

The Court: If you are going to the town from the Buckley Crossing is the church on the right-hand side of that road or on the left-hand side?

The Witness: On the right-hand side.

[fol. 393] The Court: Is this house that you were in on the right-hand side of Route 41 as you go that way or the left-hand side?

The Witness: The left-hand side.

The Court: The left-hand side?

The Witness: Yes.

The Court: The Catholic Church is on the right and the railroad tracks are on the right?

The Witness: Yes, sir.

The Court: So you are 500 feet to the left of Route 41 and that much farther from the railroad track, aren't you?

The Witness: Yes, sir.

The Court: That is the only way I know how to get at it.

The Witness: Yes, sir.

The Court: And this automobile was coming from the Buckley Crossing going towards the town so it would be on the opposite side of Route 41 from the side the Catholic church was on; right?

The Witness: Yes, sir.

Mr. Brumley: Thank you.

The Court: That is the only way I know how to get at it.

Q. How far was your house from the Catholic church?

Mr. Allen: Haven't we just had this?

Mr. Brumley: I should like to have it.

The Court: You have just said 500 or 600 feet.

The Witness: That is right.

Mr. Brumley: If I could have asked the question complete without Mr. Allen's interruption I could have brought out another point.

Q. Was that in a direct line?

A. No, sir.

[fol. 394] Q. In a direct line how far is it approximately?

A. In a direct line I would say it is close to 1,000 feet.

Q. From the Catholic church?

A. That's right.

Q. That is going directly from the Catholic church to that house.

A. In a straight line, not by the road.

Q. How far is it by the road?

Mr. Allen: Haven't we already had that?

The Court: 500 or 600 feet.

The Witness: That is right.

The Court: You go down Mechanic Street?

The Witness: That's right.

The Court: How far is it that way?

The Witness: It doesn't make any difference.

The Court: All right, it doesn't make any difference.

Q. About 6 o'clock that night what were you doing?

A. About 6 o'clock that evening I was just getting into my car.

Q. Where were you going?

A. I was going down to the center of town.

Q. And were you alone?

A. I was going to go alone, yes, sir.

Q. Did you hear any railroad train go by?

A. I heard a train whistle.

Q. In what direction did that whistle come from?

A. That whistle was directly in back of my vicinity of the Catholic church.

Q. You were not facing, then, toward the Catholic church?

A. No, sir.

Q. Did you get into your car?

A. I did.

Q. When did you learn about an accident?

A. Upon returning to the same house about ten minutes—five or ten minutes later.

[fol. 395] Q. When you got into the car you drove off?

A. I did, sir.

Q. Right away?

A. Yes, sir.

Mr. Brumley: That is all.

Cross-examination.

By Mr. Allen:

Q. Mr. O'Bryan, as you were on Mechanic Street where this house of the Selva's was your car was facing away from Route 41?

A. That's right, sir.

Q. When you came out you were going away from Route 41.

A. That's right, sir.

Q. And you were alone?

A. Yes, sir.

Q. No one else was with you?

A. No one else in the car.

Q. And when you say you heard this whistle where were you?

A. I was standing beside my car just entering the car.

Q. And that was at this place 500 or 600 feet away from the Catholic church along the road right of way, right?

A. That's right.

Q. Or 1,000 feet in a direct line?

A. That's right.

Q. Did you just hear one whistle?

A. That's all.

Q. Was there a long whistle?

A. I remember distinctly I heard a train whistle.

Q. No, I say was it a long whistle?

A. Well, I wouldn't say. It was a whistle.

Q. That all?

A. That's all.

Q. You don't know where it came from?

A. Yes, it came from the vicinity of the Catholic church.

Q. Did you hear more than one whistle?

A. No, sir.

Q. And you immediately got in your car?

A. Yes, sir.

Q. And drove away and came back five minutes later or more?

A. Yes, sir.

Mr. Allen: That is all.

[fol. 396] AMENIO ANTHONY SELVA, called as a witness on behalf of the defendants, was examined by the Court on the voir dire as follows:

By the Court:

Q. How old are you, Son?

A. Fifteen.

Q. Do you go to Sunday School?

A. Yes.

Q. Do you know the nature of an oath, do you? You know what it means if you take an oath, don't you?

A. Oh, yes.

Q. What happens if you don't tell the truth?

A. Why, I don't know.

Q. What do you think would happen to you? If you go to Sunday School you ought to know what is going to happen. If you don't tell the truth what is going to happen to you?

A. Punishment.

Q. By whom? What does Sunday School teach you? What does your Sunday School teach you on that?

A. Punishment.

Q. By whom?

A. Sunday School, By the priest.

Q. By the priest?

A. Yes.

The Court: That is good enough for me. Raise your right hand, sir.

(Amelio Anthony Selva was duly sworn as a witness.)

Direct examination.

By Mr. Brumley:

Q. Do you remember the night of December 25, 1940?

The Court: He would. He would remember that night.

A. Yes, sir.

[fol. 397] The Court: It was Christmas, wasn't it?

The Witness: Yes, sir.

Q. Where were you about 6 o'clock?

A. I was outdoors with *by* brother-in-law.

Q. What is that?

A. I was outdoors with *by* brother-in-law.

Q. With Mr. O'Bryan who has just testified?

A. Yes, sir.

Q. How far do you say your house is from the railroad track?

A. From the railroad track or the main road?

The Court: From the railroad tracks.

(The witness paused.)

Q. Let me ask you this: How far is your house from the church?

A. Well, I should say about 700 or 800 feet.

Q. And is there a swamp between the railroad tracks and your house?

A. A little pond.

Q. A pond?

A. Yes.

Q. And at any time around 6 o'clock were you looking in the direction of the railroad tracks?

A. Yes, sir.

Q. And did you see any train?

A. I was talking with one of my friends outdoors.

Mr. Allen: What was that?

The Court: "I was talking with one of my friends outdoors." Go ahead.

A. (Continuing.) All of a sudden I heard a noise from the train and I looked directly down the crossing to the little pond and the railroad track and I saw a big light.

The Court: A big light.

The Witness: Yes, sir.

Q. Did you see the train at all?

A. Yes, sir.

[fol. 398] Q. And in which direction was that light going?

A. Towards State Line.

Q. And then what did you do?

A. And then I sat down with my friend again.

Q. Were you sitting down when you saw the light?

A. No, I was standing beside the car talking to him.

Q. Were you beside the car talking with him?

A. Yes, beside the car.

Q. Did you hear any crash at the crossing?

A. No, I didn't hear any crash at the crossing.

Q. Did you go to the crossing after the accident?

A. Yes, sir.

Q. And what time did you get there? Do you know about what time?

A. Oh, about 6:10.

Q. And were there other people there?

A. Yes, there was some people.

Q. And were there automobiles there?

A. Yes.

Q. When you got there did you notice how far the train was from the crossing?

A. No, sir.

Q. Did you notice whether there was any light on the train when you got there?

A. Yes, there was a big light shining towards State Line.

Mr. Allen: Did you say "towards State Line"?

Mr. Brumley: Yes, that's right.

Q. And did you stay there for some time?

A. Well, I stayed there for about a half hour.

Mr. Brumley: That is all.

Cross-examination.

By Mr. Allen:

Q. Amelio, is that your name?

A. Amenio.

Mr. Brumley: Amenio.

[fol. 399] Q. You said that you were talking with a friend?

A. Yes, sir.

Q. Who was that friend?

A. John Gennari.

Q. And was your brother-in-law, Mr. O'Bryan, there?

A. Yes.

Q. Was it his car that you were sitting on?

A. Yes, sir. No, standing beside it.

Q. Standing beside it?

A. Yes.

Q. And was he out there too?

A. Yes, he was just getting in the car.

Q. He was just getting in the car?

A. He was just getting in the car.

Q. He was just getting in the car when you looked and saw this big light; is that right?

A. Yes, sir.

Q. You didn't hear anything?

A. No. I didn't hear anything.

Q. You didn't see the train itself, did you?

A. I saw when I looked down directly across the pond, yes.

Q. Was it a big train?

A. Yes, a big train.

Q. A long train?

A. No, a short train.

Q. How many cars about?

A. It was an engine and a caboose.

Q. You could see that?

A. Yes, sir.

Q. From where you were?

A. Yes, sir.

Q. Were there any street lights running down there at all?

A. There is no street lights down there.

Q. You said you got down to the crossing about 6:10.

A. A little after. A little after.

Q. Who told you about 6:10 anybody?

A. No, sir.

Q. How long have you been down here, Amenio?

A. Down here?

Q. Yes.

A. This will be my sixth day.

Q. Are you getting paid for coming?

A. Yes, sir.

Q. How much are you getting paid?

A. I don't know, sir.

[fol. 400] Q. Are you getting paid for every day?

A. I don't know.

Q. Do you go to school?

A. Yes, sir.

Q. And you are staying I suppose in some hotel.

A. Yes, sir.

Q. When you got down there where the accident was there was a dim light on the tender shining towards State Line?

A. Yes, sir.

Q. That is the only light you saw?

A. That's all.

Q. Are you sure about that?

A. Yes, sir.

Q. There wasn't any light on the caboose?

A. On the caboose there was two little headlights.

Q. Two little headlights?

A. Two little headlights in the back of the caboose, yes, sir.

Q. That is all the lights you saw?

A. Yes, sir.

Mr. Allen: That is all.

The Court: That is all.

BERTHA McDERMOTT, called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

Direct examination.

By Mr. Brumley:

Mr. Brumley: Have you got Exhibit 5, Mr. Allen?

(Mr. Allen handed a paper to Mr. Brumley.)

Q. Mrs. McDermott, you live in West Stockbridge?

A. Yes, sir.

Q. And you are the widow of Mr. McDermott, the engineer.

A. I am.

Q. I show you this photograph, Plaintiff's Exhibit 5. Does your house show in that picture?

A. No, it is not.

[fol. 401] Q. Is it to the right of that view shown in the photograph?

A. To the right, yes.

Q. And is it partly on the other side of the bond as shown in that photograph?

A. Yes, there is the bond and then the roadway and then my home.

Q. There is the pond and then the roadway in front of your home?

A. Yes.

Q. And then your home, right?

A. Yes.

Q. That shows the town crossing, so-called.

A. Yes.

Q. The main or Main Street Crossing.

A. Yes.

Q. How far would you say that house is from that crossing?

A. My house would be diagonally up that way, I should say in the neighborhood of 500-550 feet perhaps (indicating).

Q. How long have you lived there?

A. We have been living up in West Stockbridge in that vicinity for ten years, since 1930.

Q. Is your house higher than the pond?

A. Yes, it is.

Q. On the night of December 25, 1940, where were you?

A. Sitting in the living room of my home.

Q. And what was the first thing if anything that attracted your attention to the train?

A. Why, I was listening of course for the train, and I heard the train blow at what is termed in our town "Center Street Crossing."

Q. That is an answer, the crossing below the Main Street Crossing.

A. The crossing below the Main Street Crossing.

Q. And why were you listening for the train?

A. I was waiting for my husband to come home.

Q. Then what did you do, or what did you hear rather after you heard the train whistle for the Center Street Crossing?

A. I heard it blow at the Main Street Crossing and then I saw the light as we term it, the back-up light. That would be in a diagonal direction from my home. I saw it from the living room window and I heard the whistle.

[fol. 402] Q. Where was that light?

A. Well, it was on what they call a back-up, right on the tender on the front towards State Line.

Q. Do you know about how far Center Street Crossing is from the Main Street Crossing?

A. Why, I couldn't tell the exact distance. It is only a short way, perhaps a station.

Mr. Allen: I must object, your Honor. We have a plan drawn here. We can figure that out.

The Court: Sustained.

Q. It was a short distance?

A. Just a short distance.

Q. What did you do if anything?

A. Why, after seeing the light and hearing the whistle I opened the living room door and went out on the porch to signal to Mr. McDermott, as was my usual custom.

Mr. Allen: I move that it be stricken out.

The Court: Sustained.

Q. Went out on the porch?

A. I went out on the porch.

Mr. Brumley: The rest of it is out.

Q. You went out to do what?

Mr. Allen: I object to that.

The Court: I will take it. In order to signal Mr. McDermott.

The Witness: Yes.

Q. Who was with you at the time?

A. Mr. Hoermann.

Q. Who was he?

A. He was a friend of my son's, waiting at our home for him. He was a classmate in college with my son.

[fol. 403] Q. What did you do? You went on the front porch and did what?

A. Mr. Hoermann did the signalling and I waited, and Mr. McDermott answered with two toots of the whistle.

Q. Where was the train at that time?

A. Directly opposite our house.

Q. When you say "two foots" what do you mean?

A. Mr. McDermott—that was always our signal when he was coming in.

Mr. Allen: I move that it be stricken out.

The Court: I might remind counsel that I am not interested in any signals down at that crossing, Mr. Brumley. It does not mean a thing. I will let you prove a light but not a signal. I don't understand why objections have not been made on both sides.

Mr. Brumley: Many of the plaintiff's witnesses have testified—

The Court: I do not care about it. You should know by now. I am going to charge the jury that whether any signal was given at this crossing has no bearing. I will grant you that you could show whether there was a light on that train down at that crossing. You know, Mr. Brumley, that he could signal at 99 crossings and not at that crossing. You know too that he might not signal at any other crossing and he could signal at that one. I am going to charge the jury that they must consider that?

Mr. Brumley: Wouldn't it be a question of credibility?

The Court: I know, but I do not care about it on credibility. All right, go ahead. I will take care of that on the jury charge.

[fol. 404] Mr. Brumley: Wouldn't it be on the question of credibility whether he did signal at that crossing?

The Court: You know how I will charge the jury. You know what I am going to say to the jury. I am going to ask the jury to consider and be very careful about determining whether these people were where they say they were when they say they were. Go ahead.

Mr. Allen: I think the answer "he always"—

The Court: That is all.

Q. Did you stay out on that porch?

A. I did.

Q. Did you see the train go by?

A. I did.

Q. Was there a headlight on the tender at that time?

A. There was.

The Court: She calls it a back-up light; is that right madam? You mean there was a light on the tender and the tender was going backward?

The Witness: Yes, sir, there was a light, that's right.

Q. Did you hear any more whistles from that train?

A. Yes.

Q. What whistles did you hear?

A. Well, I could hear very plainly at the next whistling post which was prolonged, two long and two short, it sounded to me, and then prolonged.

Q. You stayed out on the porch how long?

A. Why, several minutes waiting for my son.

Q. When did you learn about the accident at the crossing?

A. When Mr. McDermott returned home.

Q. Did you notice the speed of the train as it went by?

A. Very slowly.

[fol. 405] The Court: What do you mean by that, madam?

The Witness: Well, I am not much of a judge of distance, only from driving a car, and I should say not over 15 miles an hour.

The Court: You could tell that of a train 1,000 feet away?

The Witness: Yes, I can. No, I wouldn't say 1,000 feet away. I was 550 feet away this way and 450 feet the other way (indicating).

Q. Do you say you could sit in your automobile and not look at the speedometer and tell what speed you were going along on the road? Do you think you could?

A. No, I couldn't say definitely but Mr. McDermott—

The Court: No. No. You are sitting in your own automobile that you have been driving for years; is that right?

The Witness: Yes.

The Court: And you just cover the speedometer; do you think you could tell whether you were going 25 miles an hour?

The Witness: I could tell the difference between slow and fast. I should say 10 to 15 would be slow, and then fast would be 25 or something.

The Court: What would 40 be?

The Witness: Just the speed of an engine.

Mr. Brumley: All right, that is all.

Cross-examination.

By Mr. Allen:

Q. Your house was 550 feet away?

A. Diagonally when I first saw the light; 450 directly opposite.

Q. From the railroad?

A. The railroad, yes, sir.

Q. And which way as shown here in Exhibit 5 (indicating)?

[fol. 406] The Court: Mr. Allen, she points it out. That is the trouble.

Mr. Allen: I didn't see.

The Court: I know, but counsel should look at those things. She pointed out away over to the right.

Mr. Allen: That is all.

The Court: Step down.

FRANCIS JAMES HOERMANN, called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

Direct examination.

By Mr. Brumley:

Q. What are you doing now, Mr. Hoermann?

A. I am in the United States Air Corps, at Parkville Field, Louisiana.

Q. In December, 1940 where were you living?

A. Canaan, New York.

Q. On December 25, 1940, where were you in the late afternoon?

A. About 3 o'clock I went to Mr. McDermott's residence.

Q. Have you ever had any occasion to be connected with the railroad company?

A. No, sir.

Q. Where were you in the house about 6 o'clock?

A. I was sitting in the easy chair on the opposite side across from Mrs. McDermott.

Q. Tell us what you heard in reference to any train if you heard anything and tell us what you did?

A. While waiting for Mr. McDermott,

Mr. Allen: I move that it be stricken out.

The Court: Yes, strike it out. He asked you what you heard, if anything, about a train.

[fol. 407] The Witness: We heard a short whistle.

The Court: No, what did you hear? You don't know what anybody else heard, Mister; you can only talk for yourself.

The Witness: I heard the train whistle. We saw the light.

Mr. Allen: No.

A. (Continuing:) I saw the light. Pardon me, and I stepped to the doorway. Mrs. McDermott stepped out of the room on to the porch. I flicked the light on three or four times, off and on.

Mr. Allen: What was that?

The Court: "I flicked the light on three or four times, off and on."

What kind of light was that?

The Witness: The porch light.

Mr. Brumley: I object.

The Court: Sustained.

You flicked the light on three or four times? You put it on and off?

The Witness: Yes.

Q. Where was the train when you did that?

A. Just coming off the Center Street Crossing.

Q. Then what did you see or hear?

A. I heard two short toots to answer the light.

Q. You heard two short toots?

A. Yes. I saw the headlight on the engine and then—

Q. Where was the light on the train?

A. It was on the side and it was going up the track towards State Line.

Q. Was it a bright light?

A. Very bright, sir.

Q. Could you see that easily?

A. Yes, sir.

[fol. 408] Q. How fast would you estimate the speed of the train as it passed?

A. I wouldn't care to say, sir.

Q. Was it going at a rapid rate of speed?

A. No, sir, it was going slowly.

Q. And after the two toots that you heard did you hear any more whistling?

A. I heard several sharp toots and after the train passed I went back into the house.

Q. After the two toots did you go into the house?

A. Yes, sir.

Q. And did you close the door or did you leave the door open?

A. I closed the door, sir.

Q. And what did you do then, stay in the house?

A. I stayed at the house for I should say about fifteen minutes and then I went home.

Q. Did you go down to the scene of the accident at any time that night?

A. I passed the scene of the accident on the way home, sir.

Q. Did you go up to the train?

A. Yes, sir.

Q. What time did you get to the scene of the accident?

A. It was about 6:30, around there, sir.

Q. And where was the train at that time?

A. Oh, just about 100 feet from the crossing, this side of the bridge across the river (indicating).

Q. The State Line side of the highway?

A. That's right.

Q. And did you make any observation of the engine or tender?

A. I just saw that the steps were knocked out of position on the right-hand side of the engine.

Q. Where was the step, do you know?

A. It was hanging on one side.

Q. Was that step on the tender or between the engine and tender?

A. It was between the engine and the tender, sir.

Mr. Brumley: That is all.

[fol. 409] Cross-examination.

By Mr. Allen:

Q. Mr. Hoermann, you are a friend of the McDermott family?

A. Yes, I am, sir.

Q. For how long, sir?

A. About three years, sir.

Q. You have known the son very well?

A. Very well, sir.

Q. And you have visited there very often.

A. Very often, sir.

Mr. Allen: That is all.

FRANK D. GIACOMO, called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

Direct examination.

By Mr. Bramley:

Q. Mr. Giacomo, you are employed by the New Haven Railroad Company?

A. Yes, sir.

Q. What is your position?

A. Assistant district claims attorney.

Q. And your office is located in Boston.

A. Yes, sir.

Q. And are you an attorney and counsellor at law in the Commonwealth of Massachusetts?

A. I am, sir.

Q. How long have you been admitted to practice?

A. Seventeen years.

Q. Did you see Miss Norma Gennari on or about February 26, 1941?

A. I did.

Q. I show you this Defendants' Exhibit E and ask you whether that is a statement in your handwriting witnessed by you?

A. Yes, sir.

Q. And do you remember where that statement was taken?

A. In Pittsfield.

Q. Miss Gennari read the statement, or did you read it to her?

A. She read it.

[fol. 410] Mr. Allen: I move that that be stricken out.

The Court: Strike it out.

Did you read the statement to her?

The Witness: I didn't.

The Court: Did you hand it to her?

The Witness: I did.

Q. And did she hold it and look as though she was reading it?

A. She did.

Q. And then did she sign each page?

A. She did.

Mr. Brumley: That is all.

Cross-examination.

By Mr. Allen:

Q. Was this the first time you saw Miss Gennari, in February—on February 26, 1941?

A. No. I believe I saw her before that.

Q. How many times?

A. Twice. That was the second time.

Q. Did you take a statement from her the first time?

A. I did not.

Q. Did you talk to her about the accident the first time?

A. I believe I did; yes, sir.

Q. And ask her what she knew about it?

A. Yes.

Q. Did she tell you?

A. She said she was too busy; to see her some other time.

Q. Where did you see her that time?

A. At her home in Stockbridge.

Q. What was she doing?

A. There were quite a few people in the house at the time.

Q. So you went to the place where she was working?

A. Oh, no; no. The second time I saw her at her rooming house in Pittsfield.

Q. I thought you said you went where she worked.

A. No.

[fol. 411] Q. How long did you talk to her the first time?

A. Just a few minutes.

Q. You didn't ask her any questions about the accident?

A. Not many.

Q. And the second time was at her rooming house?

A. Yes.

Q. Were people with you?

A. No, sir.

Q. Did you ask her questions?

A. I asked her questions.

Q. Then you paraphrased and wrote it down?

A. That is right.

Q. You paraphrased her answers and made a story out of it?

A. No, I didn't make a story out of it. I wrote what she said:

Q. Did you ask her whether she heard a bell or whistle?

A. Yes.

Q. And she said No, didn't she?

A. No, I don't think she said—

Q. Didn't she say no?

A. She said she didn't know whether she did or not.

Q. You asked her whether she had seen the train, didn't you?

A. Yes, I believe I did.

Q. She said she didn't see the train, did she?

A. That is right.

Q. Did you ask her whether she heard any bell or whistle?

A. I believe I did.

Q. Did she say No?

A. She said she couldn't say whether she heard it or not.

Q. Whether she heard it or not?

A. Yes.

Q. How many times did you see her after that?

A. None; that is the last time.

Q. You never saw her after February 26th?

A. No, sir.

Q. Do you know whether anyone else in your office saw her?

A. Not from my office.

Q. Someone else from the railroad?

A. I presume so.

Q. At the time you took Miss Gennari's statement on [fol. 412] February 26th you had statements from all the members of the crew, hadn't you?

A. I think so.

Q. And had you been down to the scene of the accident?

A. Yes.

Q. It was you who took this picture of the engine, Exhibit F?

A. No, sir.

Q. Do you know who took it?

A. No, sir.

Q. Do you know when it was taken?

A. No, sir.

Q. Was any picture, to your knowledge, taken of the caboose?

A. No; not to my knowledge.

Mr. Allen: That is all.

The Court: That is all.

Mr. Brumley: That is all.

LOUIS FREDERICK HELFRICH, called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

Direct examination.

By Mr. Brumley:

Q. Mr. Helfrich; you are employed by the New Haven Railroad Company?

A. Yes, sir.

Q. How long have you been so employed?

A. About 18 years.

Q. And you are a special representative of the New York Claim Department of the railroad?

A. Yes, sir.

Q. Did you go with Mr. Hunt and interview folks including Lawrence Bona and Mrs. Bona?

A. Yes, sir.

Q. Did you at any time say to Mrs. Bona, in words or substance, "You are working here. You know that the New Haven brings all the steel in here and brings all the food and everything else to Pittsfield"?

A. No, sir.

Q. Did you say anything like this, either in words or [fol. 413] substance, to Mrs. Bona: "Have you been over there on a trip to New York?"

A. No, sir; I don't quite get that question.

The Court: You had better finish the whole thought.

Mr. Allen: He read the words over there.

The Court: I think we have got to take the minutes.

Mr. Brumley: I will.

The Court: Did you say in words or substance to the effect that if she had said there was a whistle blown you would have given her a trip to New York?

The Witness: No, sir.

The Court: In words or substance?

The Witness: No, sir.

The Court: In words or in substance?

The Witness: No, sir.

The Court: All right.

Mr. Brumley: That is all.

By Mr. Brumley:

Q. Did you say that if she had heard bells and whistles we would give her a trip to New York?

A. No, sir.

Q. Did you say anything like that?

A. No, sir.

Q. Did you make any promise of any kind?

A. No, sir.

Mr. Brumley: That is all.

Cross-examination.

By Mr. Allen:

Q. Mr. Helfrich, you are the gentleman who was up there with Mr. Hunt, the stenographer, are you?

A. Yes, sir.

Q. How many times after the time you were there with [fol. 414] Mr. Hunt did you go to see the folks?

A. I saw Lawrence Bona—I believe it is Lawrence Bona—and his wife, in Farnham once after the first time I visited him.

Q. Did you go to see Mr. Bona at his place of business, wherever he worked there at the time, in Pittsfield?

A. Yes, sir.

Q. And that was after you had taken Mr. Hunt up there and interviewed them; is that right?

A. That is right.

Q. Did you ask for further details about the accident when you went to his place of business; yes or no?

A. No, sir.

Q. No. What did you go there for?

A. To ask him if there was any material change in his testimony that he had previously given me.

Q. I see. And then that night you went to the home, didn't you?

A. That is right.

Q. And you saw Mr. and Mrs. Bona there?

A. That is right.

Q. That is the night you took the written statement from Mrs. Bona?

A. That is right.

Q. And she signed it?

A. That is right.

Q. She scratched out something, didn't she?

A. That I don't remember.

Q. I see. At that time when you were at the house of Mrs. Bona wasn't there some talk about coming to New York?

A. No, sir.

Q. Weren't there some remarks about, "Are you going to New York?"

A. No, sir.

Q. Did you ask him whether the plaintiff had asked him something about going to New York?

A. I had asked Lawrence Bona in the afternoon if he had been to New York since the last time I saw him.

Q. What did he say to you?

A. He said Yes.

Q. Did you ask him if anyone had asked him to come down to New York to see the trial?

A. Well, may I answer that—

[fol. 415] Q. Did you ask him?

A. Will you re-state that question?

Q. Did you ask him when you saw him at his place of business in the afternoon whether anyone had asked him to come down to New York for the trial?

A. As to that I will answer I don't remember.

Q. When you got to the house—he would not talk to you there in the place of business that day, would he?

A. He said he was too busy; that is the sum and substance of it.

Q. He said, "Come to the house tonight"?

A. Yes.

Q. Did you say that you would come around that night?

A. No. I asked him if his wife was home.

Q. Did you say you would come around to the house that night?

A. He said she was not home, and I said I can drop around to see her.

Q. Was that the night you did drop around to see her?

A. That is right.

Q. Did you ask her whether anyone had asked her to come to New York?

A. No, sir.

Q. You didn't say a word?

A. No, sir.

Q. Did you ask him whether anyone had asked him to come down to New York for this case?

A. I could answer that in a different manner.

The Court: No, no. Answer the question.

The Witness: No, sir. No.

Q. Was there any discussion?

A. The only discussion was in the afternoon.

Q. Nothing at the house that night in front of Mr. Bona?

A. No, sir.

Q. Did you ask her anything about whether she wanted to change her testimony?

A. No, sir.

Q. Did you sit down there that night and take this written statement from her?

A. I did.

[fol. 416] Q. Was that after you had had the preliminary talk with her husband?

A. That is right.

Q. When—that evening?

A. I had talked to him in the afternoon.

Q. He was out in the kitchen with some friends, wasn't he?

A. That is right.

Q. They were cleaning a gun out there for some shooting?

A. That is right.

Q. You remember that?

A. They were doing something.

Q. After you had had your talk with Mrs. Bona in the living room you stepped over toward the kitchen? The kitchen is right off the living room, isn't it?

A. Well, as you go out the living room you step through a doorway into a hall, and out the hall as a matter of a few feet is the kitchen.

Q. That is right. As you were doing that was there not some remark passed by you, "Well, are you coming down to New York?" "Did anybody make you an offer to come down to New York?"

A. No, sir.

Q. This second visit that was talked about was in October, wasn't it, about two or three weeks ago?

A. That is right.

Q. And that is the time you took a written statement?

A. That is right.

Mr. Allen: That is all.

The Court: Step down.

Mr. Brumley: Your Honor, I have Mr. Troy, the postmaster. I have not had a chance to speak to him. May I have five minutes? He has just come down.

The Court: I should like to finish. Is that your last witness?

Mr. Brumley: Then there is one other matter of proof that I should like to speak about. Mr. Allen and I can [fol. 417] speak to you about it, and that will be, I think, my last witness. I mean I have never met Mr. Troy.

The Court: You will be only about ten minutes, will you, altogether? I should like to leave at 4 o'clock.

Mr. Allen: Will you pardon me a minute?

The Court: Have you got any rebuttal?

Mr. Allen: Oh, no, your Honor.

The Court: Very well.

Mr. Allen: I have the Expectancy Tables, your Honor.

The Court: That is a matter of proof. Let this jury step out now and let that other jury get into the box. I should like to hear the other openings for about ten minutes.

(A brief recess was taken at this point.)

JOHN J. TROY, called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

Direct examination.

By Mr. Brumley:

Q. Mr. Troy, where do you live?

A. In West Stockbridge.

Q. How long have you lived there?

A. Well, I was born there. I have been away from West Stockbridge for ten or so years, but I lived there practically all my life.

Q. What is your position?

A. I am postmaster.

Q. On the night of December 25th last year about 6 o'clock where were you?

A. In the post office.

Q. What were you doing?

A. Getting out the mail to go out for the evening.

Q. Was your attention called to a train going through West Stockbridge at that time?

A. Yes, sir.

[fol. 418] Q. You tell us what you heard and what you saw.

A. Well, the train—I was in there making up the mail and the train was coming whistling and kept whistling for the crossing, as they say, following the Center crossing.

Mr. Allen. I must object to that.

The Court: You cannot do that. All you can do is what the train was doing. You don't know why it was doing it. There might have been a cow on the track, for all I know. Just tell us what you heard.

The Witness: The train whistled all the way through the streets of West Stockbridge.

Q. Did you at any time see the train or the reflection of the train?

A. Yes, I could.

Q. Which—the train, or the reflection?

A. No; the reflection.

Q. When you saw the reflection where was that?

A. It was just north of the center crossing.

Q. That is, it had passed the center crossing?

A. Yes, sir.

Q. And in what direction was the train going?

A. Towards State Line, in a northerly direction.

Q. After it passed the Center crossing did you see it or the reflection pass the Main Street crossing?

A. Well, yes, sir; yes, sir.

Q. Did you hear any whistle of the train after the train had passed the Main Street crossing?

A. Yes, sir.

Q. Can you tell how many whistles you heard?

A. Well, it whistled repeatedly. It started from the lower crossing and it whistled through the village. It went all the way up through, even away as far as I could see.

Q. How far could you see?

A. Well, from the office it is probably 200, 250 feet above the Main Street crossing.

Q. And was the train whistling then?

A. Yes, sir.

Mr. Brumley: That is all.

[fol. 419] Cross-examination.

By Mr. Allen:

Q. You were sorting mail, you say?

A. I had been; yes, sir.

Q. Mail goes on busses from there, does it?

A. It is taken from there. It is taken from there right to State Line.

Q. On what?

A. Trucks take it.

Q. It was not for any train; you were not sorting mail for any train?

A. For any train?

Q. Yes.

A. Well, it goes on a train when it gets to State Line.

Q. You were not putting the mail on a train?

A. No, sir.

Q. So you were not listening for any train because you had to put mail on it?

A. No, sir.

Q. How many feet do you say your post office is from these railroad tracks?

A. 400.

Q. From the Main Street?

A. It is probably 700.

Q. On which side of the Main Street crossing?

A. On which side?

Q. Yes; on the side where the Catholic church is, or on the opposite side?

A. Do you mean where the church is?

Q. Yes.

A. It is on the opposite side.

Q. It is 700 feet away from the crossing?

A. That is right.

Q. And your crossing is only a mile away from the Buckley crossing, isn't it?

A. No, sir.

Q. We have got it measured; about how many feet?

A. Probably a half a mile, or a little more.

Q. And you are 700 feet beyond that?

A. I was about 700 feet; yes.

Q. Were you on the grounds of this post office building?

A. Yes; yes.

Q. Has it got windows all around it?

A. Yes; but it is not a very substantial building, if that is what you mean.

[fol. 420] Q. The front of your building looks out which way?

A. Toward the railroad.

Q. Where is the place where you were sorting mail?

A. Well, I was sorting mail right in the back.

Q. In the back?

A. It is just a very small building.

Q. After you had finished sorting mail was when you saw and heard what you have testified to; is that right?

A. That is right.

Q. There was nobody else there?

A. Yes, sir.

Q. Who?

A. My wife.

Q. You didn't hear any bells?

A. Well, no. You couldn't hear no bells.

Q. But this whistle was blown continuously?

A. Yes, sir.

Mr. Allen: That is all.

Mr. Brumley: That is all.

The Court: Now, if you want to, you can offer that statement. I think I will have it for you tonight.

Mr. Brumley: I thought your Honor was going to let me give that to you in the morning.

The Court: Would you rather do that in the morning?

Mr. Brumley: Yes.

The Court: And you will have it all set?

Mr. Brumley: I will have it all set.

The Court: Gentlemen of the jury, I do not want to chide you, but some of you were late. I am having court open at 10 o'clock tomorrow. Do not be late tomorrow, because I want to get this case to you tomorrow by one o'clock. Some of you were late today. I am not going to bring that up again. But get here at ten o'clock tomorrow morning, and not at ten minutes past ten. Ten o'clock tomorrow morning, please.

(Adjourned to November 18, 1941, at 10 o'clock A. M.)

[fol. 421]

Brooklyn, N. Y., November 18, 1941
(10 A. M.).

Trial Resumed

Mr. Brumley: The defendants offer in evidence the statement of the engineer, who the proof indicates is now dead, a statement taken in the regular course of business, the defendant claims, after the accident happened.

The statement was signed by the engineer, and is marked for identification as Exhibit J, under Section 695 USCA 28.

The defendants offer the proof also that this statement was signed in the regular course of any business, and that it was the regular course of such business to make such statement.

Mr. Allen: I object to the statement.

The Court: Mr. Allen objects to the introduction of this statement in evidence, and the Court sustains the objection and grants an exception to the defendant.

Mr. Brumley: That is, the statement to be marked in evidence, consisting of four pages.

The Court: Will counsel for the defendants make his motion to dismiss, in order to clarify the record? The Court wants to indicate to the defendants that there will be three questions of fact submitted to the jury, and only three—lack of light, the failure to ring a bell, the failure to blow a whistle, and the failure to have a light burning on the front of the train. Those are the only items of negligence on which there is any proof offered, I believe, and those are the only items of negligence that the Court intends to submit to the jury.

MOTION FOR A DIRECTED VERDICT

Mr. Brumley: I will make a motion now for a directed verdict on the general ground that the plaintiff has failed [fol. 422] to prove any negligence on the part of the defendant; that the plaintiff operator was guilty of contributory negligence in the common law action; that plaintiff was guilty of violation of Section 15, Chapter 90 of the General Laws of Massachusetts in the statutory action, and that plaintiff's action for his wife's estate is barred by reason of violation of Section 15, Chapter 90 on his part.

The Court: The Court will reserve decision on this motion.

Mr. Brumley, one hour, please; and watch your own time. I dislike very much to say that time is up, but in order to keep it within the time, I am allowing one hour for each of you, and one hour for myself.

(Mr. Brumley made a closing statement to the jury on behalf of the defendants.)

(Mr. Allen made a closing statement to the jury on behalf of the plaintiffs.)

IN UNITED STATES DISTRICT COURT

THE COURT'S CHARGE TO THE JURY

The Court (ABRUZZO, J.):

Gentlemen of the Jury: There are two actions here—one by Howard F. Hoffman, in his individual capacity, and one by him as administrator of the estate of his wife, who

is deceased; and you will, of course, have to render a verdict in each case.

The claim of the plaintiff, summarized briefly, is this: that on December 25th last, he was riding along Route 41, and when he reached the railroad crossing of the defend- [fol. 423] ant company, some distance back he saw railroad tracks, he says, and slowed down until he came to a complete stop some 15 or 20 feet from the tracks.

He testified that he saw no train, no light, heard no whistle, heard no bell, and then proceeded to start his car again, and that when he got on the first rail that he was driving toward, and when he was over that rail, he saw a big object to his left, and the next thing he said he knew was when he woke up in the hospital some time later.

The plaintiff called as witnesses various persons who were in a car going downhill, and, to summarize their testimony, they claim that they were all near the church when something clicked on their car in the rear, and they were cognizant of the fact that the car would not run, and at that time they were coasting downhill; that later they came upon this accident, and saw the train that had the accident. They have testified that at various points they heard no whistle and no bell, and that there was not any light, so far as they knew, up at the front of this train. These persons, as you will recall, also testified that they saw the train back in the town.

Briefly summarized, therefore, the plaintiff contends that the defendant was negligent, in that this train had no light, rang no bell, or blew no whistle.

The defendant, on the other hand, through its witnesses, contends that the train did have a light; that it blew the whistle and rang the bell. The defendant has brought various witnesses, members of the crew, persons in town, relatives of some of the members of the crew; and their contention is that the locomotive was pushing the tender backward, so to speak, with the caboose on the other end. They say there was a light at Daily's some distance away, on the tender. You have heard it described to you. They say it was burning, and that it threw a light 1,000 feet. They [fol. 424] assert that in the town, some half a mile from this particular crossing, they blew whistles and rang the bell, and that the light was shining at that time, and that when they got some 1300 feet or some such distance from the

crossing, the whistling post apprised the engineer of the fact that he was approaching the crossing, and that he blew the whistle there, that the bell was ringing, and the light was on. That is the defendant's story through the witnesses that it called.

As I remember it, one of the witnesses, Meach, the fireman, said he saw the car coming 400 feet from the crossing; that the train at that time was about 400 feet from the crossing; that it seemed to him that the plaintiff slowed down near the crossing, and then apparently started up and struck the side of the tender with a bump, breaking the step. Then, apparently, their contention is that after that bump, it dragged the car some distance, and threw it against a telegraph pole in the ditch, and that was when the real crash happened.

Those are the stories, gentlemen. Both of them cannot be true, can they? Either one of the stories must be true, and the other one not. It will become your duty to reconcile the testimony, to analyze it, and put your fingers on where the truth is.

The plaintiff asserts that there is a law in Massachusetts that reads as follows, and I charge you that this is the law of this case: "Every railroad corporation shall cause a bell of at least 35 pounds in weight and a steam whistle to be placed on each locomotive engine passing upon its railroad, and such bell shall be rung or at least three separate and distinct blasts of such whistle sounded at the distance of at least 80 rods from the place where the railroad crosses upon the same level with any public way or traveled place over which a sign board is required to be maintained as provided in Section 140 and 141, and such bell shall be rung or [fol. 425] such whistle sounded continuously or alternately until the engine has crossed such way or traveled place. This section shall not affect the authority conferred upon the Department by the following Section."

The next section says that:

"Every railroad corporation shall cause boards supported by posts or otherwise at such height as to be easily seen by travelers and not obstructing travel, containing on each side in capital letters at least 9 inches long the following inscription: 'Railroad Crossing. Look out for the Engine,' to be placed and constantly maintained."

With respect to that particular law, there is not any proof in this case that that law was violated, because it seems that everybody has agreed, on both sides, that there was such a sign, apprising people using the road that there was a railroad crossing, and in addition to that, as I recall it, the plaintiff Hoffman admitted that he saw the railroad sign lighted up from his headlights and that that apprised him that a short distance away there was a railroad crossing.

The first question which you will have to determine is whether the defendant was negligent, as set forth in the complaint, and in the proof offered by the plaintiff through his witness. When you go to your jury room, that is the first question you will take up. Was this defendant negligent?

You must take into consideration, in determining that fact, what is the duty of the railroad—what are they supposed to do? They have the right of way with a train. A train cannot be expected to stop at every crossing. It has a perfect right to go over crossings and to go over in momentum and not stop.

There is no dispute in this case, gentlemen, about speed. Nobody contends that this train was going at an excessive [fol. 426] rate of speed; so that is not in the case, and the only thing you will have to determine is whether or not a bell was rung or a whistle blown, and whether or not the train had a light at the front.

If you find from the testimony that it failed to give the signal required by the statute in the manner set forth therein, you may find that the defendants were negligent. If you find that the bell on the engine was not rung, or, at least, three separate and distinct blasts of the whistle of the engine sounded at a distance at least 80 rods from the place where the railroad crossing the highway continued until the train reached the highway, you may find the defendant negligent. If you find that a bell was sounded and a whistle blown 300 feet from the crossing, as testified to, such sounding of a bell and blowing of a whistle would not meet the requirements of the statutes. If you find that the defendant in any way violated the statute regarding sounding of a bell or blowing of a whistle, you may find it negligent.

If you find that the defendants did not blow any whistle or ring any bell approaching this crossing, you may find the defendant negligent. Irrespective of any statute, if you find that the defendants' employees on such train failed to give adequate and sufficient warning of the approach of this train toward the crossing, you may say that the defendant was negligent. If you find that the defendants' train approached this crossing without any light on the forward end of said train, you may take that into consideration in determining whether the defendant was negligent or not. If you find that the plaintiff Howard Hoffman stopped 15 to 20 feet from the crossing and looked and saw nothing, and listened and heard nothing, you may find that there was no light on the front end of the train, and that no whistle or bell had been sounded.

[fol. 427] In order to find the defendant guilty, therefore, you see, gentlemen, you must determine from this proof that the bell was not rung in accordance with the statute, or the whistle was not blown in accordance with the statute, and that there was no light on the train.

Of course, if you find that there was a light on the train and the bell was rung and the whistle blown, that will be the end of this case, gentlemen, and you will then find the defendant not negligent, stop your deliberations right then and there, and return a verdict in both cases in favor of the defendant.

The burden of proving the negligence of the defendant is upon the plaintiff. The plaintiff must prove to you by a fair preponderance of the evidence that the defendant in this case was negligent. A preponderance of the evidence means this, gentlemen, as best I can define it for you: if it were possible to put the evidence of both sides on a pair of scales, and you marked my left hand "Plaintiff", and my right hand "Defendant", and at the end of your deliberations you found that the evidence was evenly balanced and the scales did not tip either way, then the plaintiff has not sustained the burden cast upon him by law, and your verdict would have to be for the defendant. If, on the other hand, you find that on the left hand the scales go down a little bit as compared with the right, then the plaintiff has met the burden of the preponderance of proof cast upon him by the law. You see, gentlemen of the Jury, the burden is upon the plaintiff on that feature of the case.

Assuming that you reach a finding that the defendant was negligent, you will then go to the next feature of the case, and that is whether or not the plaintiff was in any way contributorily negligent, under the proof in this case, and I have defined that that proof is as much as I think you need, and it will be your duty to find from the [fol. 428] evidence whether the plaintiff was himself guilty of any contributory negligence.

There are two statutes that relate to the contributory negligence in this case, and I think I will read them for you, and this is the Massachusetts law which I charge you, and you must accept that as the law of this case:

"Every person operating a motor vehicle upon approaching a railroad crossing at grade shall reduce the speed of the vehicle to a reasonable and proper rate and shall proceed cautiously over the crossing.

"In all actions of a civil nature to recover damages for the injuries to the person or property or for causing the death of a person, the person injured or killed shall be presumed to have been in the exercise of due care, and contributory negligence on his part shall be an affirmative defense to be set up in the answer and proved by the defendant."

That means, gentlemen, that the defendant has the burden, as I have just told you, of proving the contributory negligence. The definition of that burden is exactly like the one I just gave you as to the contributory negligence.

After you have taken up this question of contributory negligence, if the scales are evenly balanced, the defendant has not sustained the burden; but if the defendant's testimony on contributory negligence weighs a little bit more than the other side's, then, of course, the defendant has sustained the burden of contributory negligence.

Section 15 that I have just read to you requires active diligence by a motor vehicle operator, and its command is not couched in terms of due care and diligence. Even though you find the defendant failed to blow a whistle or give other warning signals, this did not relieve the plaintiff from the duty to use active diligence.

I may say this now, gentlemen: that, no matter how [fol. 429] negligent you find the defendant to be, if you find that the plaintiff Hoffman, in driving his car under the rules that I am laying down to you, was himself guilty of

any contributory negligence, that defeats his cause of action. In other words, you might find under the rule that I have laid down to you that the defendant was negligent and then go to the second question and find that the plaintiff was also negligent. Your verdict under those circumstances would have to be for the defendant in this case. If you find in the death case under the statute or under the proof that the defendants offered, that this girl who was killed was herself guilty of any contributory negligence—and, of course, although you have got to take into consideration in her case that she was not driving the car, nevertheless, she owed a duty to look for trains and listen to whistles and listen for bells—even though the defendant was negligent; that would defeat her case, and in her case you would have to find a verdict for the defendant.

The driver must look when he can see—he must not look carelessly. He must look for a train where he has a clear and unobstructed view. If by reason of darkness or for any other reason the plaintiff's view of the track was obstructed so that he was unable to see the approaching tender and engine, it was his duty to act with reasonable care and caution, and to stop until he could ascertain whether he could cross safely, and if he did not have his car under such control that he could stop, or he elected to proceed, he failed to exercise the degree of care he should have exercised; there can be no recovery in this action under the law of the State of Massachusetts.

While Section 15 of Chapter 90 of the General Laws of Massachusetts does not in terms require the driver of an automobile to stop before crossing a railroad track, if the plaintiff by stopping could more effectively have obtained information as to whether a train was approaching than [fol. 430] by looking and listening without stopping, then the statute required him to stop.

I charged you about the law, which is aside from the statutory law, and that is what we call the common law. There are two sets of laws that I have charged you—and keep in mind that one is statutory; meaning that which I have read to you as the statutes, and the other one is the common law—that which I have charged you aside from the statutes. In basing your analysis of the testimony under the common law, a finding of ordinary negligence on the part of the plaintiff will defeat recovery.

If there was a violation of a penal statute as a contributing cause, recovery is barred at common law to the plaintiff, as well as under the grade crossing statute, and a violation of Section 13 is a violation of a penal statute.

If Hoffman became aware in any way of the approach of the train in time to avoid it, you must find for the defendant, because then the plaintiff did not look, or looked carelessly, or did not listen, or listened carelessly.

If the plaintiff operator had ample opportunity, with the exercise of proper caution, to observe the approach of the locomotive, and if he looked at all, he must have looked carelessly or must have continued on in disregard of the danger which was in plain sight, then as a matter of law he was guilty of contributory negligence and he cannot recover.

If the driver of the automobile actually saw the train in time to avoid colliding with it, but nevertheless entered the crossing, no negligence on the part of the defendant could be a proximate cause of the accident.

So, you see, gentlemen, if you find, after an analysis of all of the testimony, that the plaintiff was guilty of any contributory negligence under the rules which I have laid down to you, that defeats his recovery.

[fol. 431] There are some general rules that I must charge you with respect to the analysis of this testimony. The credibility and the honesty of each and every witness is for you and you alone to determine. Whether or not any witness has testified falsely to any material fact is for you to judge, and for you alone. If in this case you find that any witness has testified deliberately and falsely to any material fact, you are at liberty to disregard that witness' entire testimony, or set aside that which you believe is untrue, and take that which you believe is true. It will be your duty to use your good common hard sense and logic in the analysis of this testimony. You must try to analyze the interest that each witness might or might not have, where that witness was at the time he gave testimony as to what happened, what he was doing, whether he was thinking of the whistle or listening to the whistle, whom he was employed by, and what interest he has; and that applies to both sides.

Of course, I do not have to tell you that railroad employees are interested witnesses to the extent of their

employment.⁴ I do not have to tell you that you must determine each and every witness from your own standpoint, as to how he acted in the manner of testifying, and whether he struck you as telling the truth; whether he was in a position to hear the whistle, whether he was paying any attention, and whether a whistle was blown, because, after all, gentlemen, I do not have to tell you that testimony such as, "I did not hear the whistle," is valueless, if one were not listening for a whistle.

If witnesses have testified that they did not hear a whistle, or think they heard a whistle, taking it either way, and they were in a position where they were not paying any attention to it one way or the other, you must take that into consideration in determining the value of that witness' testimony. How far he was away is for you to take into consideration. What the testimony is is for you, [fol. 432] and for you alone, to take into consideration. I cannot help you with that. You are not to take what the lawyers say the testimony is. You are not even to take what I say the testimony is. You are to take what you remember of the testimony—and that alone. If I have helped you in quoting the testimony, accept it; if I have not, and you think the testimony is different from what I have said, you can overrule me, and you can take your own recollection of the evidence. These are general rules that I am laying down to you in guiding you toward a decision that will be right in this case.

I do not have to tell you that this is a very important case. It is important to this plaintiff; it is important to this railroad; it is important that the principle of justice survive, no matter whom it helps or hurts.

You are not to consider this case from the standpoint of sympathy. You are not to consider it from the standpoint of treating the railroad as a railroad, and the individual as an individual. That is not right. You might be here yourselves some day, and you would want the kind of trial that I want you to give both of these parties. You are to assume that Smith is suing Jones. If Smith is right, then your verdict should be for Smith, and if Jones is right, then your verdict should be for Jones, under the rules that I have laid down. It is a very pathetic case, but you are to leave sympathy outside the courtroom, gentlemen. It

would not be right for you to use it here. You are to take it as cold-bloodedly as you can, and try to do your best to see that the principle of justice survives.

If you find that the defendant is negligent under the rules that I have just laid down to you, if you find that the plaintiff is guilty of no negligence contributing to the accident under the rules that I have laid down to you, then you will go to the question of damages; and you are not to go to the question of damages unless you first deliberate and [fol. 433] find the defendant negligent and the plaintiff not guilty of any negligence.

On the question of damages, with respect to the young man, you will compensate him fairly, justly, and reasonably for the injuries that he sustained in this accident, and for the effects of those injuries. I think you know and remember as much of what injuries this boy is claiming to have sustained as I do. There does not seem to be much dispute as to the injuries to this boy. His left *leg* was broken and there is a plate having eight screws in it there, which the doctors tell you will be there as long as he lives. He did not have a fractured skull; he had a concussion of the brain, and the X-rays were negative as to the head. But he was unconscious for some period of time, and you heard the proof on that. With regard to the concussion of the brain and its after-effects, I might say to you that the boy, in my opinion, looked quite alert on the stand, and that his mind, it seemed, functioned all right, and there is not any proof in this case by any doctor that that is not true; but that is for you to determine. I just call your attention to that, so you will not go astray on the after-effects of the head injury. There is not, it seems, any claim by any doctor that the head injury has left any after-effects, and you are not to compensate him unless there is proof that the plaintiff suffered damages with respect to any item that you place damages on.

I think the left hand was broken somewhere, but, as the doctor told you, it seems that there are no after-effects of that. He has got a wholesome, healthy hand now, and nothing else will come in the future that will hurt the function of that hand as a result of this accident. The right leg had a comminuted fracture and the bone stuck out through the skin. You have heard the testimony of the

doctors that in that leg and in that injury there is a diseased bone, gentlemen, and that he will have to be operated [fol. 434] on for that condition, and that even after the operation he will have a 50 per cent loss of motion and function.

You know that the plaintiff is a civil engineer. You have heard some testimony as to what a civil engineer's duties are, and you have to take all those things into consideration; and in assessing damages, if you find in favor of the plaintiff, you are to compensate him for the pain and suffering he has gone through, for any injuries that he sustained as a result of this accident, and for any permanent injury that he will have in the future as a result of this collision between this train and himself. You are to take into consideration whether or not the injuries that he has sustained and whether or not the permanency—as much of the injuries as you find are permanent—will affect his earning capacity in the future. That is a question that I am going to leave entirely to you. I do not think that I can give you much guidance on that, except to say that you have heard he is a civil engineer; that he can do some of his work inside; that he may have to do some outside work. How much it is going to handicap him, I am going to leave to your good sound sense and logic. If you find that it is not going to incapacitate him very much, you will make an award for damages on that. If you find that it is going to incapacitate him, you will make an award as you find the damages to be.

As to the special damages—and I call them "special damages" because there is proof of it—they run somewhere around \$4400. My figures are somewhat different from the lawyers', and I think they are more accurate: \$1590 for the doctors' bills, \$1404 for the hospital bill, \$1225 for nurses, and \$202 for Dr. Persing. My figures are \$4421. Gentlemen, you are not to make an award of \$4421 just because there is proof that he spent that sum. You are to make only such award provided you find that the [fol. 435] expenses were reasonable. By that I mean that because one is hurt he cannot go to a hospital and have night and day nurses just because it is comfortable. One is entitled only to night and day nurses if they are necessary. You see the distinction I make. There is not any

proof of what an operation will cost in the future, or how long he will have to be in the hospital; but there is proof that an operation will be required, and that he will be some time in the hospital. I will let you use your own good common sense and logic as to what damages he is entitled to for that, if you find that that is so.

To summarize it, the plaintiff is entitled to be reasonably compensated under the terms that I have laid down to you; no more, no less—just right. This is not the place, as I often say to a jury, to give away somebody's money. You can give away all of your own money that you want to, outside of the courtroom, but not here, and I admonish you, in arriving at the damages, to analyze carefully what they should be. Because I charge you on damages does not mean that I have any opinion one way or the other, because I have not. I am telling you what the rule of damages is, because the law requires that I tell you that, and you are not to think that I have any opinion one way or the other; I have not.

With regard to Mrs. Hoffman's case, I am forced to say to you that I cannot give you very much instruction on that. I am not too sure I understand the statute myself; much less can I ask that you understand it. I am not so sure even that these lawyers understand it, but I am going to read you the statute, and then I am going to stop there, and let you interpret that statute with relation to damages as best you can. I may add one or two little remarks on it myself. In the wife's case, if you find that the plaintiff has sustained the burden of proof as to negligence, and has not been guilty of a violation of Section 15, Chapter 90, of [fol. 436] the General Laws of Massachusetts, and has not been guilty of contributory negligence, damages for death are measured according to the degree of culpability or blameworthiness. If you find negligence on the part of the defendants in the slightest degree, your verdict should be \$500; only if you find blameworthiness in the maximum degree should it be \$10,000. Any assessment of damages for death must be within these stated limits. In other words, in her case you cannot award more than \$10,000; and if you find any negligence at all, it must be \$500. What the blameworthiness of the negligence means, I do not know. What the culpability means, I do not know, gentle-

men. You will have to interpret the statute as best you can. I will say this: in interpreting that statute, you must take into account the rest of my charge. If there is any contributory negligence in the slightest on the part of this girl who was killed, no matter how slight that contributory negligence was, if you find under the rules that I have laid down that it is there in her case he is not entitled to any damages, and he is not entitled to any damages under the same rule in his own case.

Gentlemen, take this case. You have had the pleasure, I think, of having two very gentlemanly counsel here. Both know their business well. Both have tried this case, it seems to me, with the idea of helping you. Each one has been very partisan on his own side, of course, and therefore a little blind to the other side. But that is to be expected, and I think that in a lawyer is something which I would rather praise than criticize. They have given you all the evidence they have. I have told you all I could about how to arrive at a verdict. Do your duty with one view only: that when you walk out of this courtroom you will feel that you have adhered to the principles of justice that we know should prevail in these courts.

Are there any exceptions, first?

I will take up your requests afterward. Have you any [fol. 437] exceptions? I may have passed one or two requests, but I will take the exceptions, first, and then I will go back to the requests. Have you any exceptions, Mr. Brumley?

EXCEPTIONS TO THE COURT'S CHARGE

Mr. Brumley: I respectfully except to your Honor's charge in respect of burden of proof on contributory negligence.

The Court: Yes; I will give you an exception.

Mr. Brumley: I point that out in connection with our Request No. 16.

The Court: Yes; and I did not pass upon the request, because I felt that you ought to take an exception in the charge on that; do you see? You have it, at any rate.

Mr. Brumley: We except to the charge, and we except to the failure to charge, and we except to the failure to charge in respect of request No. 16.

Mr. Allen: Will you give me the whole request, please?

The Court: Wait a minute. I will give it to you so that you will not have any trouble:

"In the personal injury action, plaintiff has the burden of proving freedom from contributory negligence."

That I refuse to charge, and give the defendant an exception.

Is there anything else, Mr. Brumley?

Mr. Brumley: I think your Honor said, "If the plaintiff operator became aware"——

The Court: Which one is that?

Mr. Brumley: You were almost quoting my Request No.

7.

The Court: "If the plaintiff operator became aware."

I charged it just as you have it in your request, I am sure, But I will repeat it:

"If plaintiff-operator should have become aware, in any way, of the approach of the train, in time to avoid it, you must find for the defendants, because then plaintiff did not look or looked carelessly, or did not listen or listened carelessly."

[fol. 438] Mr. Brumley: All right. Those are the only exceptions.

The Court: Now, Mr. Allen, are there any exceptions?

Mr. Allen: There are no exceptions to your charge. On the requests, I have something.

The Court: Mr. Allen, are there any requests that I overlooked? I think I have charged most of your requests; if not the same wording, then I charged them in principle, I think.

Mr. Brumley: I do except to your Honor's failure to charge as to part of Request No. 1, "Section 15,"——

The Court: I charged that just as it is, Mr. Brumley; I am positive of that. I charged that one just as it is. You follow me. I charged 1, 2, 3, 4, 5, 6, 7, 8, and 9. No. 7 I charged twice. I gave you one too many. I did not charge 10, because that related to the proof, and I went over that proof in my main charge, you see.

Mr. Brumley: Yes.

The Court: No. 11 I charged in my own language, so I refuse to charge it as requested, because I already covered it. I refuse to charge No. 10, because I already covered it in my main charge, in principle.

No. 12 I will charge: "If you find any testimony positively contradicted by the physical facts you must not give

any credit to it,"—and accept the physical facts instead. I will charge you in that language.

I charged 13 in principle, certainly, and I charged 14, 15 is out. I did not need to charge that, because that is out of the case. I charged 16.

As to 17, I will not charge it in just that language, Mr. Brumley. I will say this; on request No. 17, I will charge you as follows: If you find that the headlight on the train was burning, gentlemen, as testified to by the defendant, then you may take that into consideration as to whether or not the plaintiff was contributorily negligent; and if you find that the light was burning, even though he said he did not see it, you must take into consideration that the law [fol. 439] assumes that one should see what is there for one to see; and if that light was burning, you may say that the failure to observe it and stay away from the track in and of itself and alone was contributory negligence and could defeat the plaintiff's action. I will put it that way.

Is there anything more, gentlemen?

Mr. Brumley: There is only one other comment I have to make in connection with this Request No. 11. I call your attention to that. I think your Honor has not stated it that way.

The Court: No; I refuse to charge the request that way. "If plaintiff operator violated Section 15 of Chapter 90, there can be no recovery for the death of his wife under Section 232," and so forth. I am going to refuse to charge quite in that language, and leave it to the jury to decide that particular part of the case under the general charge I have made.

Mr. Brumley: May I have an exception, then, to your refusal to charge Request No. 11?

The Court: Yes; but I say I have covered it in my own way. That is the reason I refuse to charge.

Mr. Brumley: I do not want to comment on it; but my point—

The Court: No; I think you can see my point, and I will give you an exception.

Mr. Brumley: Yes. Just going back a minute, in quoting from the statute as to the duty of light and so on, I think unintentionally, as I got it, your Honor said something about light and whistle, at first, and then, in reading the statute—

The Court: No; I read the law just as it was stated.

Mr. Brumley: No—"bell and whistle", and then in quoting the statute, it was "bell or whistle", but in commenting upon it, your Honor said, "bell and whistle".

The Court: No; I meant just as the statute read, "bell or whistle."

[fol. 440] - Mr. Brumley: Yes, that is all.

The Court: Now, Mr. Allen.

Mr. Allen: I will be very brief. I think five is the only one, your Honor.

The Court: No; I refuse to charge in that exact language, because you have left out the light there, Mr. Allen, you see. That is the reason I refuse to charge. I refuse to charge No. 5 in that language, because the light is left out, and because I have already covered the same thought in my main charge.

Mr. Allen: I respectfully except.

Now No. 10, if your Honor please.

The Court: Let me see about No. 10. No, I refuse to charge that, because I charged No. 9, which is very close to that, Mr. Allen, and I have already covered that feature of the case in my main charge in depicting the evidence given by Hoffman, and for that reason, having covered it in my main charge, I refuse to charge as requested.

Mr. Allen: I respectfully except. Then No. 11, and I am through.

The Court: No, I refuse to charge that, because I have already covered that in my main charge. That relates to the evidence in the case.

Mr. Allen: I respectfully except.

The Court: Very well.

You may now retire, gentlemen. I am going to send you to lunch, first, so do not begin discussing the case now. You will better be able to do so after lunch, for I think you must be a little weary now, having been here since ten o'clock.

Mr. Allen: Do you wish the exhibits together, your Honor?

The Court: Oh, yes. And I might say this to you, gentlemen: the exhibits will be with the Clerk. They will not [fol. 441] be sent to you. All the exhibits will be with the Clerk. They will not be sent to you unless your foreman requests that they be sent in. Upon request of the jury

through the foreman, any exhibit will be sent in to you at the moment you desire it.

Gentlemen, you may retire now.

(The jury thereupon retired from the courtroom.)

The Court: Will you agree to a sealed verdict? I am going to New York.

Mr. Allen: I think so. They may come in and wait some instructions.

The Court: I shall be in touch with the office. If they want any instruction, please leave word with the Clerk where you will be, because I will not give any instructions without counsel being here. I am going to be available for you and you please be available, so that they can be instructed in your presence. I usually do not tell a jury they may come in for instructions.

It is agreed by counsel for the defendant and counsel for the plaintiff that a sealed verdict be rendered by the jury and opened tomorrow morning at ten o'clock.

(Adjourned to Wednesday, November 19, 1941, at 10 a. m.)

VERDICT—November 19, 1941

Before—Hon. MATTHEW T. ABRUZZO, *Justice*, and a Jury.

(Appearances: Same counsel as heretofore noted.)

The Clerk: If your Honor please, I have here a sealed verdict, which reads:

"We, the jurors (and so forth) find in favor of the plaintiff individually the sum of \$25,000, signed by each; and in favor of the plaintiff as administrator, in the sum of \$9,000."

[fol. 442] The Court: All right, gentlemen.

Is there any motion, Mr. Brumley? Do you want the jury polled?

Mr. Brumley: Would your Honor put over the motion until Monday?

The Court: If you want to. What have you in mind?

RENEWAL OF MOTION, FOR DIRECTED VERDICT AND RULING THEREON

Mr. Brumley: I can make the motions now.

First, of course, is the motion for a directed verdict, on which your Honor reserved decision. I renew that motion at this time on the grounds stated in the motion.

The Court: That motion I now deny and give you an exception. I deny the motion made at the end of the defendant's case for the direction of a verdict, and give you an exception.

MOTION, TO SET ASIDE VERDICT AND RULING THEREON

Mr. Brumley: Yes. I also move to set aside the verdict and ask for a new trial in both cases, on the ground that the verdicts are against the weight of the evidence and contrary to law and on the exceptions taken during the trial, and on the grounds in both cases that they are excessive.

The Court: No, I am now denying the motion that you made at the end of the plaintiff's case. I now deny the motion that you made at the end of the defendant's case, and I now deny the motion you made after the rendition of the verdict, and on the question of the weight of evidence I deny that motion, because I do not think that I can substitute any opinion I might have in the case for the jury's opinion. It was a clear-cut issue of fact for the jury to determine, and they determined it adversely to the defendant, and I am going to let it stand.

Mr. Brumley: Will your Honor allow me an exception?

The Court: Oh, yes; exception to all these denials.

[fol. 443] Mr. Brumley: May I ask at this time for a stay of execution?

The Court: Oh, yes. How much stay do you want?

Mr. Brumley: 30 days.

The Court: All right; 30 days' stay.

Mr. Brumley: And 60 days to make a case.

The Court: I think it is a little different. Whatever you want within the 30-day period, all right.

Mr. Brumley: Yes.

(Discussion off the record.)

(Case Closed.)

IN UNITED STATES DISTRICT COURT

DEFENDANT'S REQUESTS TO CHARGE

REQUEST No. 1.

Section 15 of Chapter 90 requires active diligence by a motor vehicle operator, and its command is not couched in terms of due care and diligence. Even though you find defendants failed to blow whistle or give other warning signals this did not relieve plaintiff from duty to use active diligence.

Anderson v. B. & M. R. R., 302 Mass. 101, 103 (1939);
Calloway v. Pennsylvania R. Co., 62 F. (2d) 27 (C. C. A. 4, 1932).

[fol. 444]

REQUEST No. 2

The driver must look when he can see, must not look carelessly. He must look for a train where he has a clear and unobstructed view.

Fogg v. N. Y., N. H. & H. R. R., 223 Mass. 444;
Lundergan v. N. Y. C. & H. R. R., 203 Mass. 460;
Pigeon v. Mass. Northeastern Street Railway, 230 Mass. 392;
Creeley v. Boston & Maine, 263 Mass. 529;
Anthony v. Boston & Maine, 276 Mass. 392.

REQUEST No. 3

If, by reason of darkness or for any other reason the plaintiff's view of the track was obstructed so that he was unable to see the approaching tender and engine, it was his duty to act with reasonable care and caution, and to stop until he could ascertain whether he could cross safely, and if he did not have his car under such control that he could stop, or he elected to proceed, he failed to exercise the degree of care he should have exercised, and there can be no recovery in this action under §232 of chapter 160 because of the violation of §15 of chapter 90 of the General Laws of Massachusetts.

Fortune v. N. Y., N. H. & H. R. R. Co., 271 Mass. 101;
O'Meara v. Boston & Maine R. R., 277 Mass. 315, 319;
Gaboriault v. N. Y., N. H. & H. R. R. Co., 289 Mass. 36;
Cote v. Boston & Maine R. R., 278 N. Y. 78, 82-85.

[fol. 445]

Request No. 4

While §15 of chapter 90 of the General Laws of Massachusetts does not in terms require the driver of an automobile to stop before crossing a railroad track, if the plaintiff by stopping could more effectively have obtained information as to whether a train was approaching than by looking and listening without stopping, then the statute required him to stop.

See:

Curtiss v. New York Cent. R. Co., 79 F. (2d) 91 (C. C. A. 2);

O'Meara v. Boston & Maine R. R., 277 Mass. 315.

Request No. 5

In counts based upon the common law, a finding of ordinary negligence on the part of plaintiffs will defeat recovery. In counts based upon General Laws, c. 160, §232, charging defendants with failure to give signals required by §138, the plaintiffs would have no right to recover if found to be grossly or wilfully negligent, or guilty of some violation of law.

Sylvia v. N. Y., N. H. & H. R. R. Co., 296 Mass. 157 (1936).

Request No. 6

If there was a violation of a penal statute as a contributing cause, recovery is barred at common law as well as under the grade crossing statute, and a violation of §15 of c. 90 is a violation of a penal statute.

Jones v. N. Y., N. H. & H. R. R. Co., 275 Mass. 139.

[fol. 446]

Request No. 7

If plaintiff-operator should have become aware, in any way of the approach of the train, in time to avoid it, you must find for the defendants, because then plaintiff did not look or looked carelessly, or did not listen or listened carelessly.

Germaine v. Boston & A. R. R., 298 Mass. 501 (1937);

Gilmore v. Boston & M. R. R., 299 Mass. 303 (1938);

Petrone v. N. Y. Cent. R. R., 301 Mass. 352 (1938);

Kenney v. Boston & M. R. R., 301 Mass. 271

Request No. 8

If plaintiff operator had ample opportunity, with the exercise of proper caution, to observe the approach of the locomotive, and if he looked at all must have looked carelessly or must have continued on in disregard of the danger which was in plain sight, then as matter of law he was guilty of contributory negligence and that failure on his part to comply with the statute contributed to his injury.

Brown v. Boston & M. R. R., 302 Mass. 90 (1939);
Emery v. N. Y., N. H. R. R. Co., 302 Mass. 578 (1939);
Gove v. Boston & M. R. R., 307 Mass. 84 (1940).

Request No. 9

If the driver of the automobile actually saw the train in time to have avoided colliding with it but nevertheless entered the crossing, no negligence on the part of the defendants could be a proximate cause of the accident.

Gage v. Boston & Maine R. Co., 77 N. H. 289;
Southern Pac. Co. v. Stephens, 24 Fed. (2d) 182, 184
 (C. C. A. 9).

Request No. 10

When the fireman first saw the automobile involved it was 200 feet from the track and he could have properly assumed that it would come to a stop.

Kenney v. Boston & M. R. R., 301 Mass. 271, 275.

Request No. 11

If plaintiff-operator violated §15 of c. 90 there can be no recovery for the death of his wife under §232, c. 160, and §3 of c. 229.

Request No. 12

If you find any testimony positively contradicted by the physical facts you must not give any credit to it.

Chambers v. Skelly Oil Co., 87 Fed. (2d) 853 (C. C. A. 10).

Request No. 13

Where witnesses who were in a position to hear testify affirmatively and positively that they did hear a bell or

whistle, the testimony of other witnesses that they did not hear it raises no conflict of testimony for submission to you, unless it clearly appears to you that those who say they did not hear were in such a position, and were giving [fol. 448] such attention that they most probably would have heard the sound had it occurred.

Lehigh Valley R. R. v. Mangin, 278 Fed. 85, 88.

Request No. 14

If plaintiff looked and could not see beyond the edge of the highway to his left and then attempted to cross the tracks without looking again for a distance of 15' to 20' he did not proceed cautiously.

O'Meara v. B. & M. R. R., 277 Mass. 315, 319 (1931);
Germaine v. B. & A. R. R., 298 Mass. 501 (1937);
Miller v. New York Central R. R. Co., 226 App. Div. 205, affd. 252 N. Y. 546 (1929).

Request No. 15

The evidence is insufficient to warrant a finding of negligence on the part of the defendants in failing to provide other or additional safeguards at the crossing.

Commonwealth v. B. & M. R. R. Co., 101 Mass. 261;
Trask v. B. & M. R. R., 219 Mass. 414.

Request No. 16

In the personal injury action, plaintiff has the burden of proving freedom from contributory negligence.

Fitzpatrick v. International Ry. Co., 252 N. Y. 127
 133, 134;

Francis v. Humphrey, 25 F. Supp. 1.

See

Vol. 8, *The New York Law Week*, p. 602.

[fol. 449]

Request No. 17

If you find that the headlight on the tender was lighted you must find for the defendants.

Request No. 18

No negligence may be predicated upon the operation of the locomotive backwards.

D'Aurio v. Long Island R. Co. et al., 240 N. Y. 241.

Request No. 19

If you find that plaintiff has sustained the burden of proof as to negligence and has not been guilty of a violation of §15, c. 90 of the General Laws of Massachusetts and has not been guilty of contributory negligence, under c. 229, §3, damages for death are measured according to the degree of culpability or blameworthiness. If you find negligence on the part of the defendants in the slightest degree your verdict should be \$500., only if you find blameworthiness in the maximum degree should it be \$10,000. Any assessment of damages for death must be within these stated limits.

Request No. 20

If you find from all the evidence that the light was burning on the tender as the train passed over Main Street Crossing, I charge you that there is a presumption that the light continued to burn up to the time of the accident.

Edward R. Brumley, Attorney for Defendants, Office
& P. O. Address, Room 3841, Grand Central Terminal,
New York City, N. Y.

[fol. 450] **NOTE RE PLAINTIFF'S EXHIBIT 1.**

Letters of administration issued to Howard F. Hoffman as administrator of the estate of his wife, Inez Hoffman.

(Omitted pursuant to stipulation)

Plaintiff's Exhibit 2





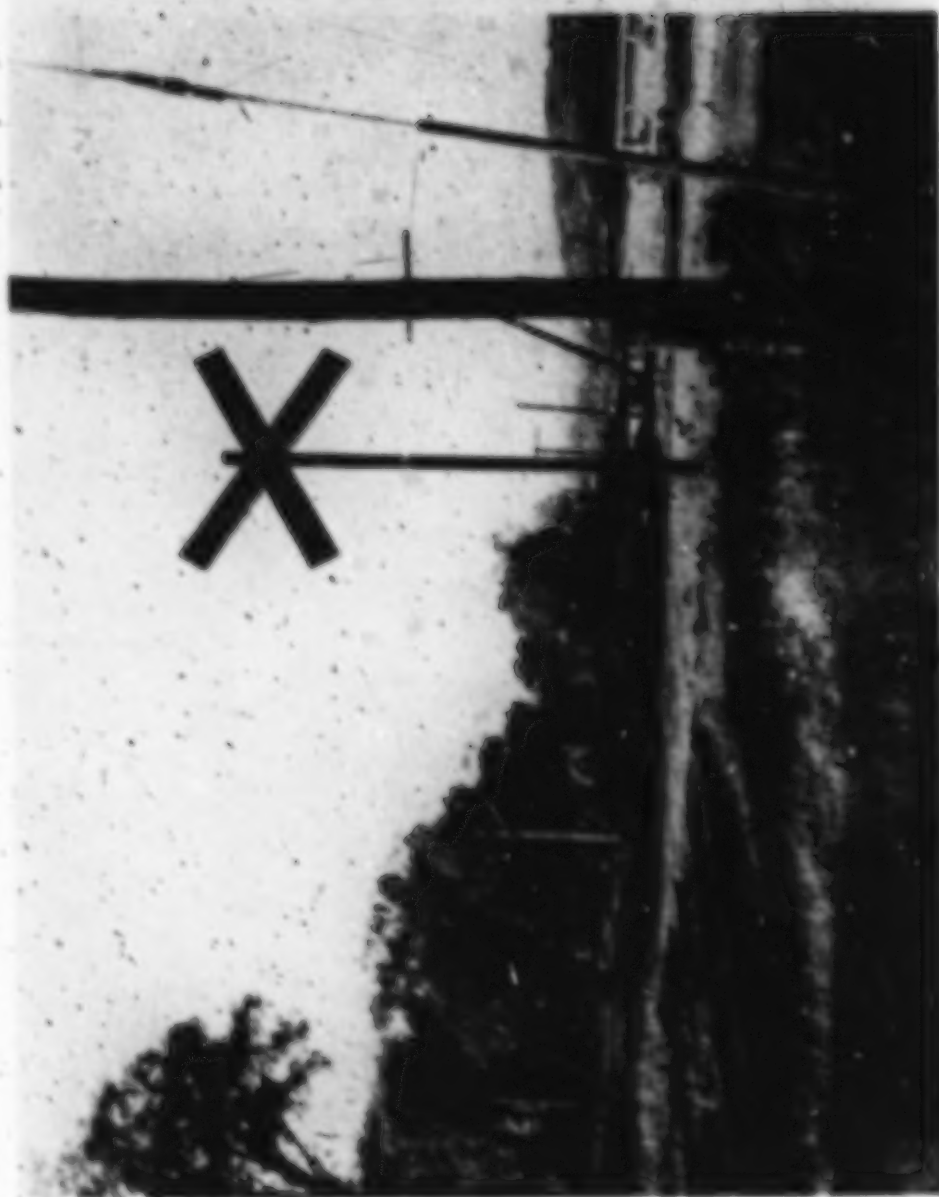
[fol. 452-453] Photograph of Plaintiff's Car

Plaintiff's Exhibit 4



[fol. 454-455] Photograph of Crossing

Plaza's Exhibit 8



[fol. 456-457] Photograph of Crossing



[fol. 458-459]

Photograph of Church

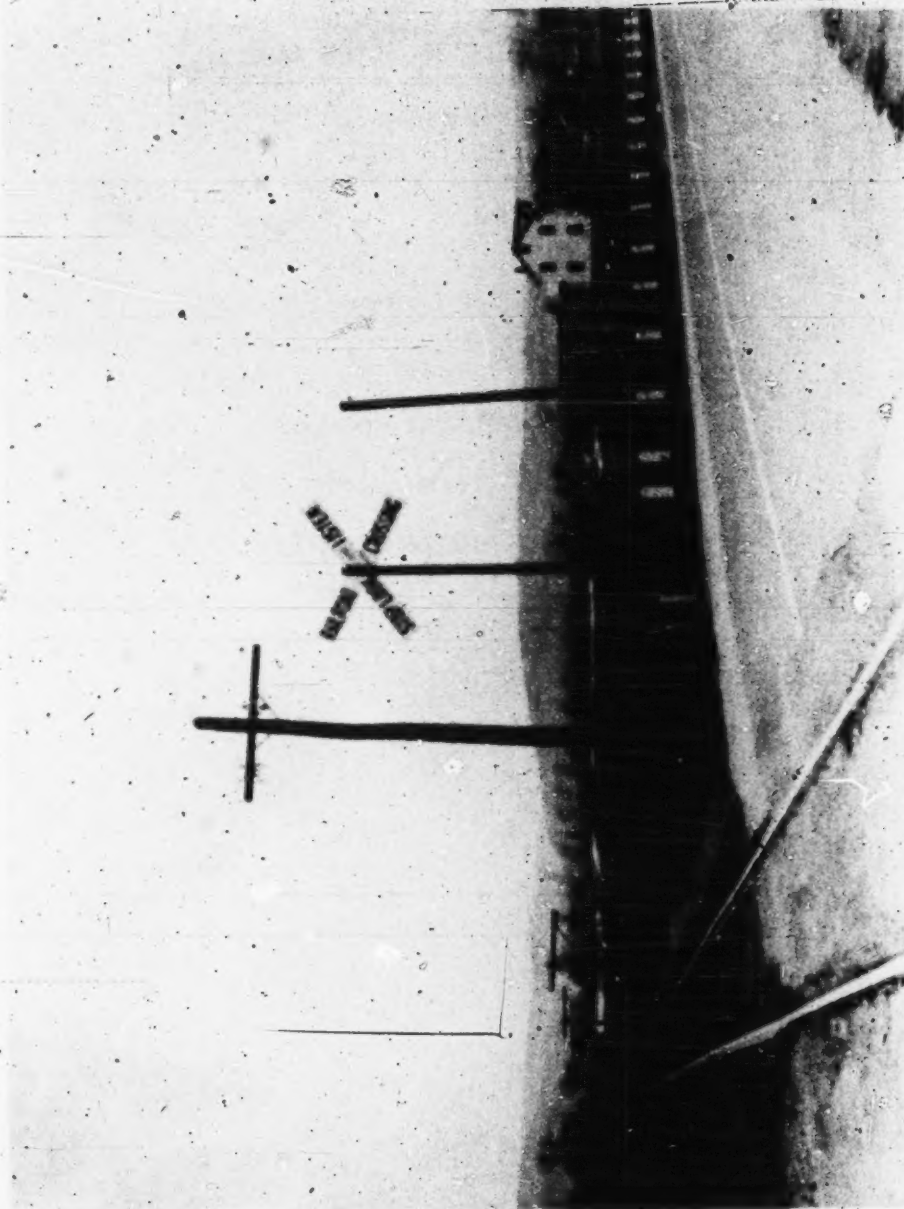
Plaintiff's Exhibit 7.



Photograph taken from about in front of church, Plaintiff's Exhibit 6, looking toward Elkey Buckley crossing.

[fol. 460-461]

Plaintiff's Exhibit 8



Photograph of crossing showing track going towards
State Line.

[fol. 462-463]

[fol. 464] PLAINTIFF'S EXHIBITS 9 TO 14, INCLUSIVE

X-rays

(Omitted pursuant to stipulation)

PLAINTIFF'S EXHIBIT 15

X-ray

(Omitted pursuant to stipulation)

PLAINTIFF'S EXHIBIT 16

Bills From Mercy Hospital

(Omitted pursuant to stipulation)

Palmer's Exhibit 17.



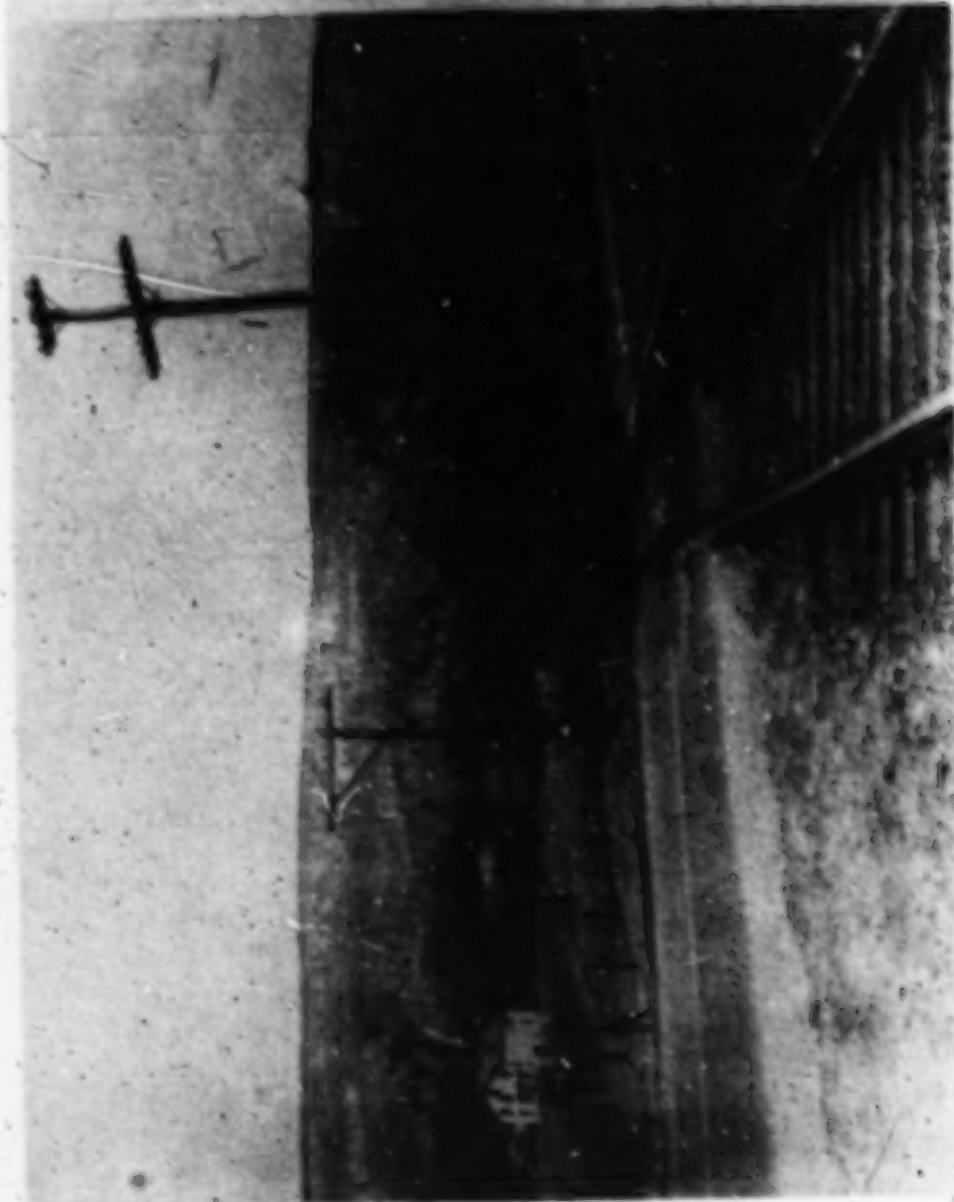


Photograph of opposite side of street from the church
[fol. 466-467]

416

416

PLATE 11



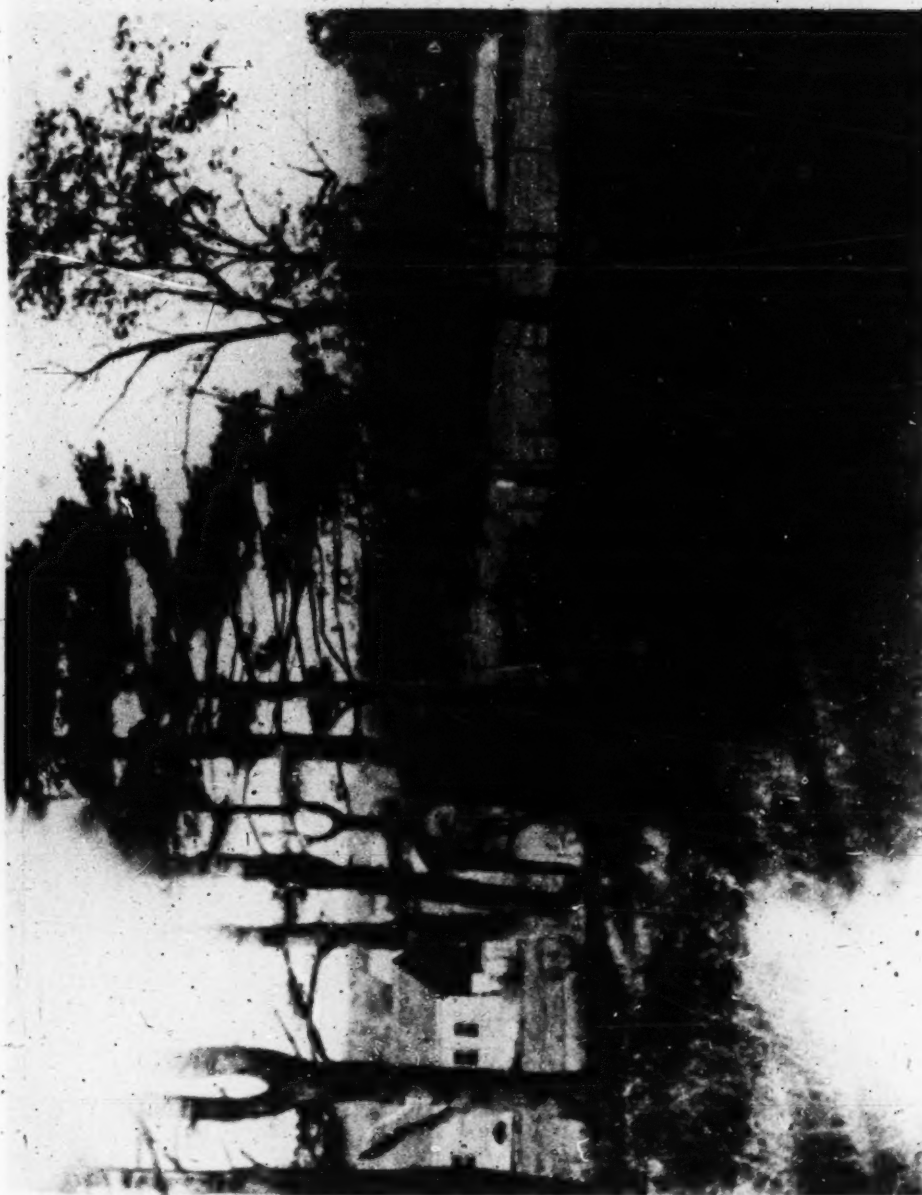
[fol. 468-469]

Photograph of Crossing



[fol. 470-471] Photograph Showing Rear of Church

Plaintiff's Exhibit 21.



[fol. 472-473] Photograph Showing Hut In Rear of Church

Plaintiff's Exhibit 22.



[fol. 474-475] Photograph Showing Path

Photostat's Exhibit 22

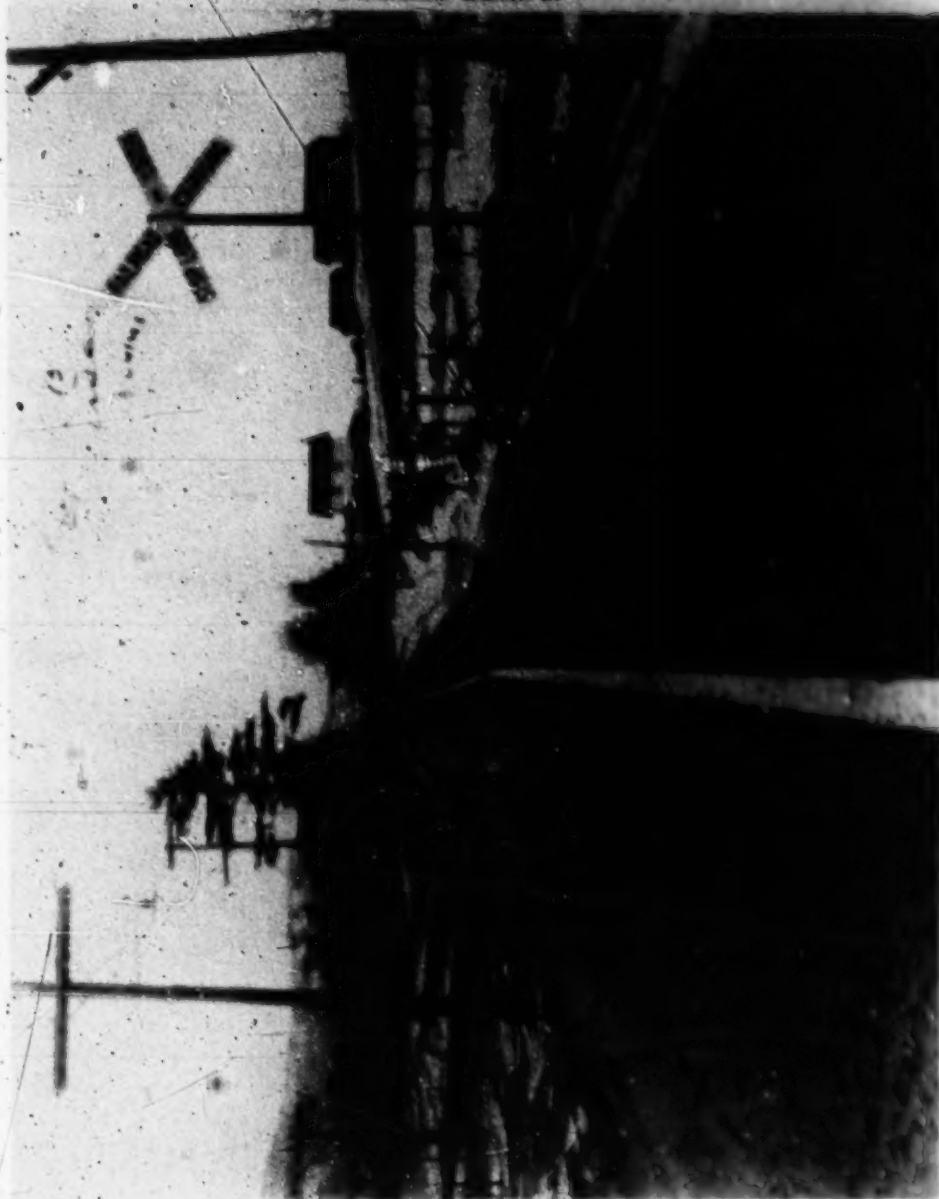


[fol: 476-477] Photograph Showing Embankment



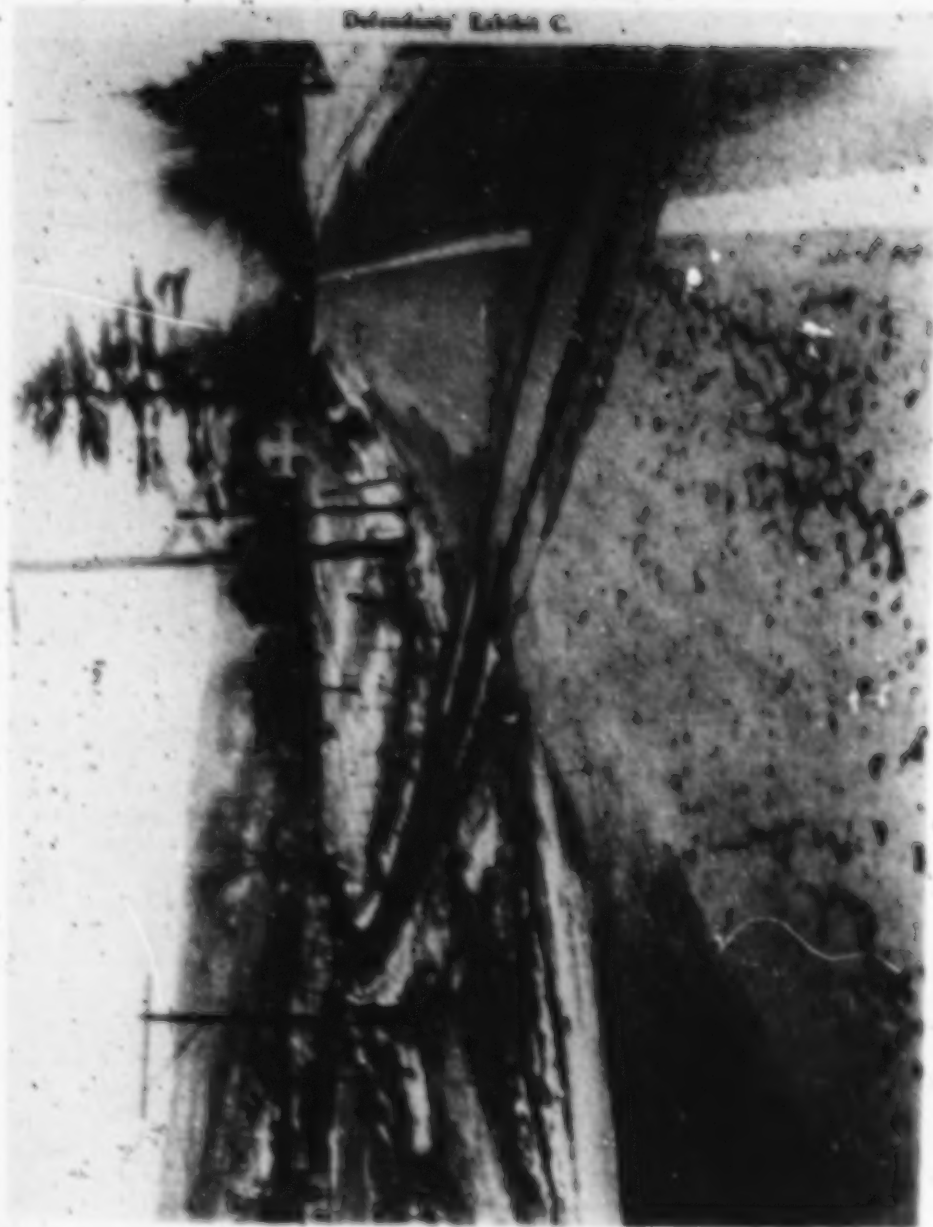
[fol. 478-479] Photograph Showing General Physical Condition

Defendants' Exhibit B.



[fol. 480-481] Photograph of physical objects in vicinity of grade crossing.

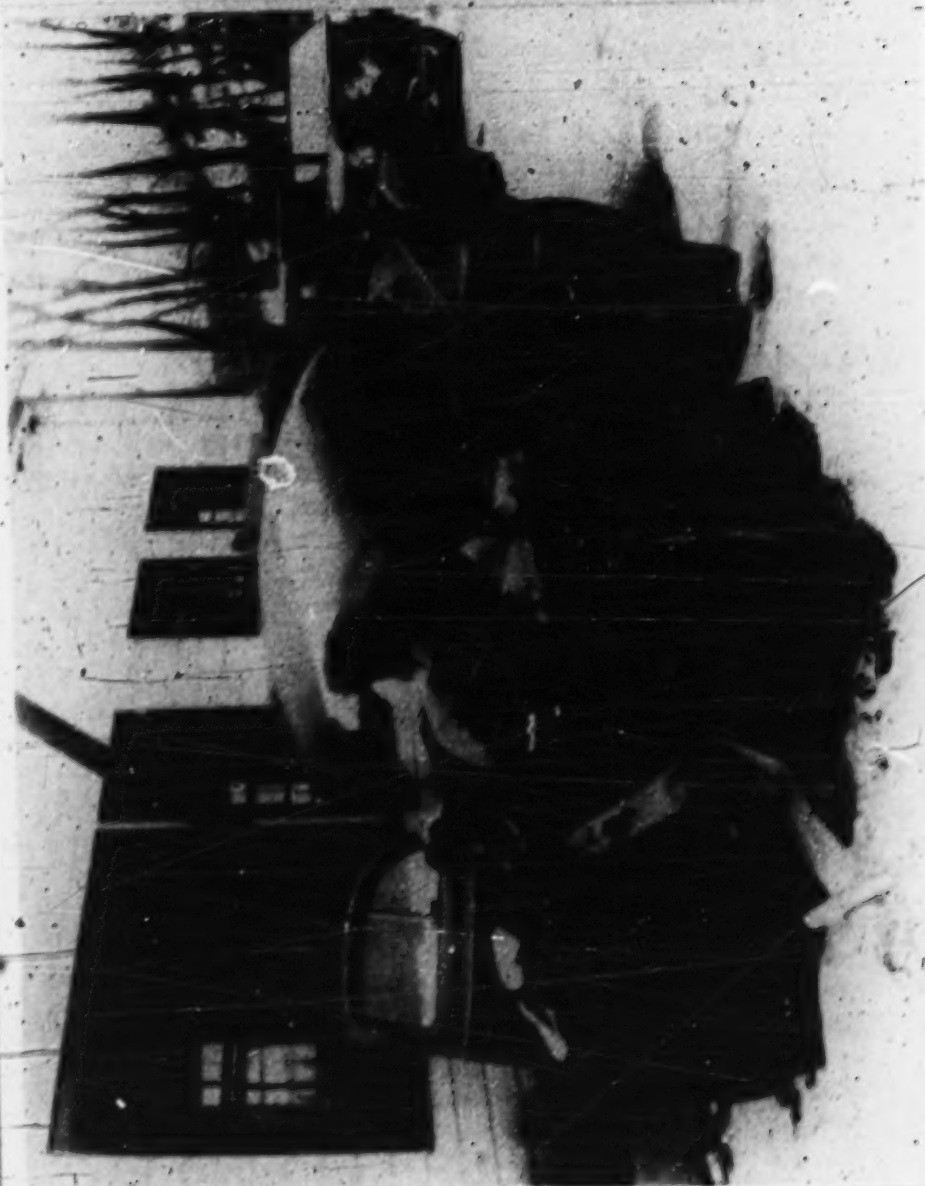
Defendants' Exhibit C.



Photograph of physical objects in vicinity of grade crossing, taken nearer track.

[fol. 482-483]

Defendant's Exhibit D.



[fol. 484-485] Photograph of Plaintiff's Car

[fol. 486]

DEFENDANTS' EXHIBIT E

Form 740

Norma Gennari. Address Albany Rd., W. Stockbridge,
Mass.

Apparent Age 19 Years.

Date Feb. 26, 1941.

States to F. D. Giacomo at 248 Bradford St. Pittsfield as follows: On Dec. 25, 1940 (Christmas Day) about 6 P. M. I was walking on Albany Rd. from west to east on south side of road toward my home which is located a few hundred feet southeast of Elkeys crossing. I was waiting for company, from Pittsfield, and expected an automobile to be coming from the opposite direction. I was walking. It is customary for me to take a short cut to my home, and when I reached St. Patrick's Church which is some distance west of crossing on south side of Albany Rd., started to cut across land owned by the church. Just as I was about to cross fence between church property and other property I heard a crash. I waited there a moment and noticed cars gather at railroad crossing and figured it was an accident. After I heard the crash I looked toward the railroad crossing, but could not see anything except cars stopping there. I did not see the accident and don't know how it happened. I did not see the train at all before the accident. I was not paying any attention to train, as I was in a hurry to get home, as I expected company. I did not see train moving toward crossing while I was walking on Albany Rd., and can't say whether or not whistle was blown or engine bell ringing, because I was not paying any attention to anything. The whistle on engine might have been blown and engine [fol. 487] bell might have been rung, although I can't say whether it did or not. I might not have heard the signals, because I was not paying any attention to train. After the accident I went down to crossing, and saw an auto badly damaged on right side of RR track not far from crossing, not overturned, facing north. A woman was laying on ground and I was told she was dead. I noticed people taking out man from car, he was unconscious. The rear end of train was stopped about 50 ft. north of crossing. I graduated Williams High School, Stockbridge, last year, and I am now employed as winder at the plant of General Electric Co., Pittsfield, Mass.

Witness F. D. Giacomo.

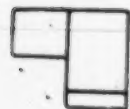
(Signed) Norma M. Gennari.

Defendants' Exhibit 4



[fol. 488-489] Photograph of Engine 438

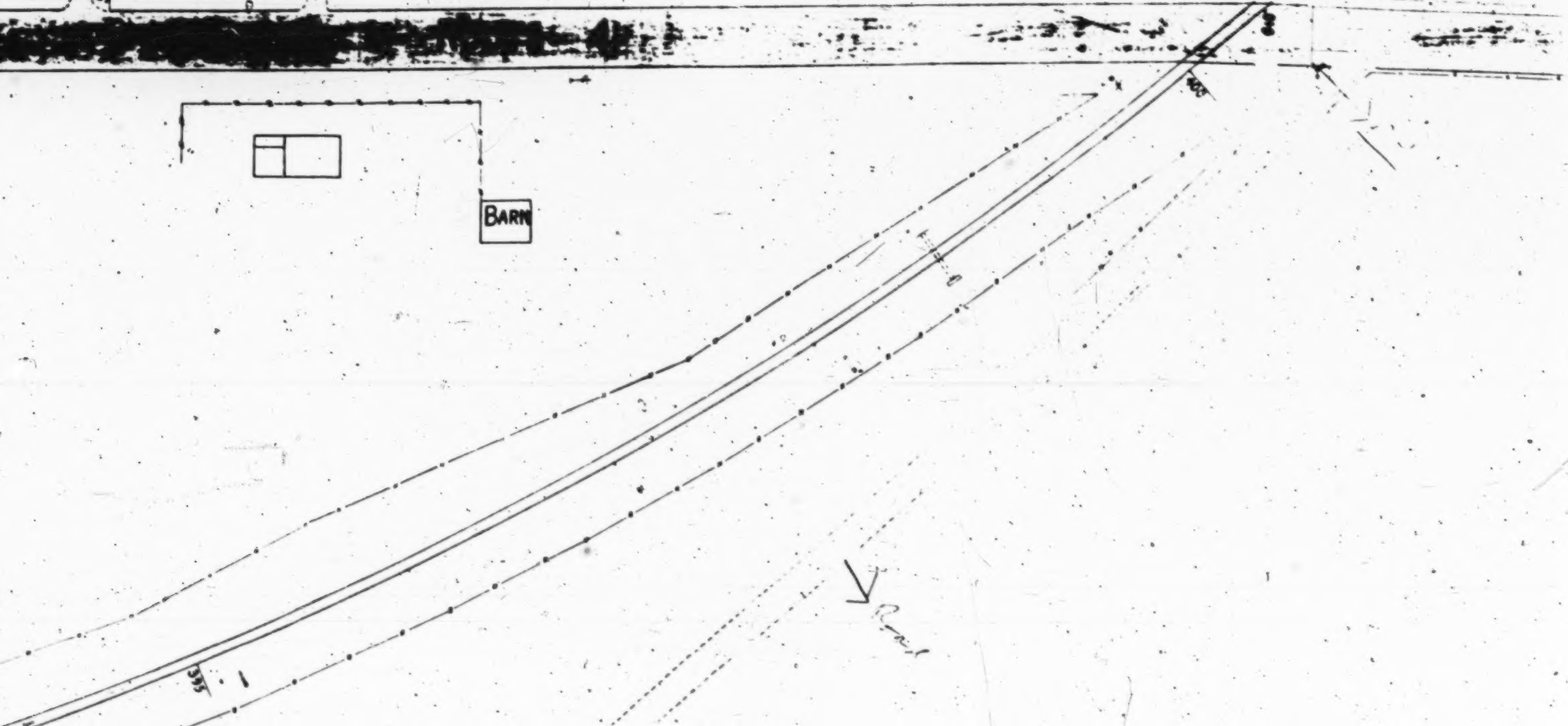
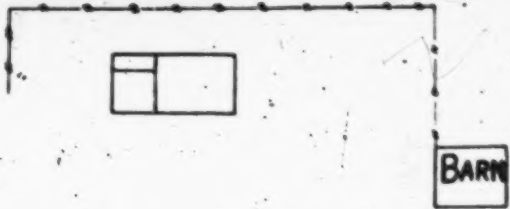
← TO GREAT BARRINGTON



CHURCH



TO STATE



TO STATE LINE

LOW

500



REFLECTOR BUTTON SIGN
SCALE 1" = 1'

428

1912
53-4-1
216



TO PITTSFIELD



CIDER
MILL

390

Top of Wall

390

395

CIDER
MILL

HOUSE

COOP

BARN

Top of Rail

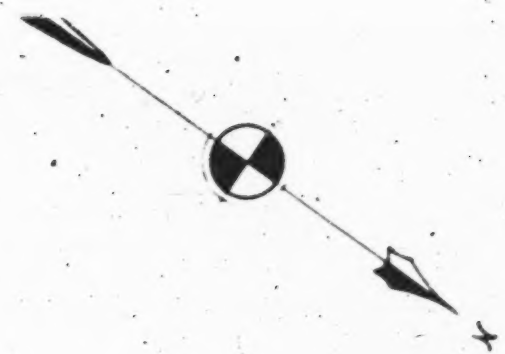
395

C. OF ROAD

400

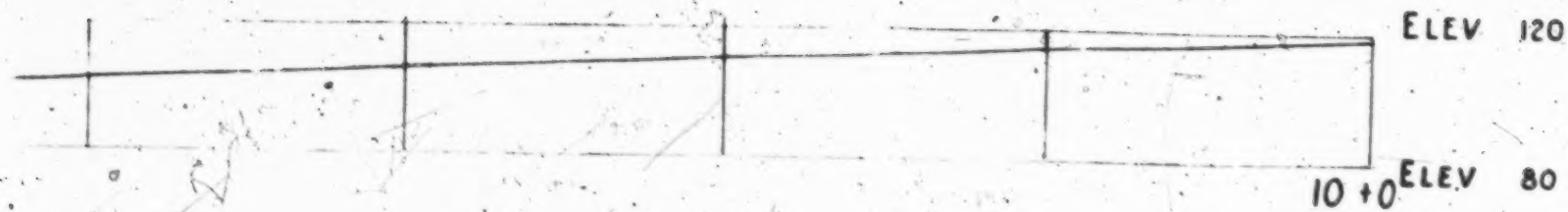
0+0

PROFILE



PROFILE

CROSSING 8.42
WEST STOCKBRIDGE, MASS.
SCALE 1" = 40'



Map of Buckley vicinity, scaled to 1" = 40'. This
has been reduced to 66 $\frac{2}{3}$ % of its original size.
1" = 60'

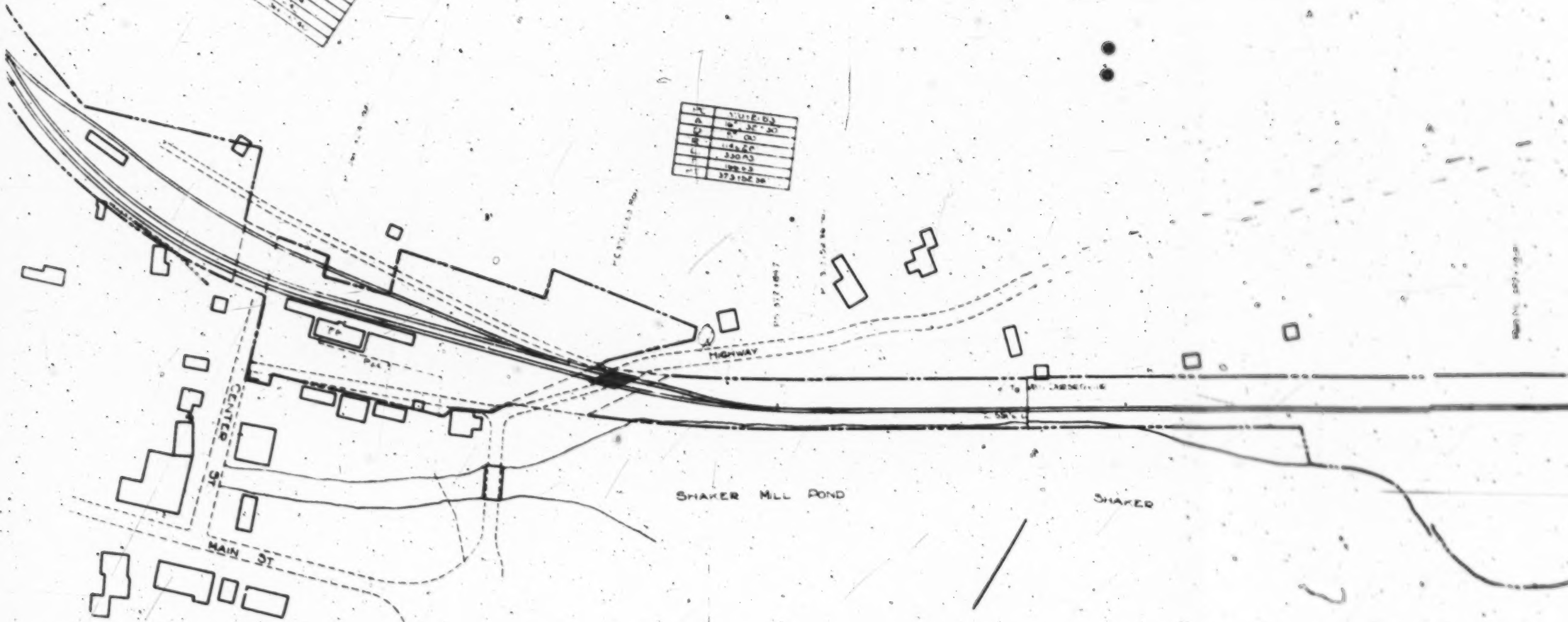
[fol.]

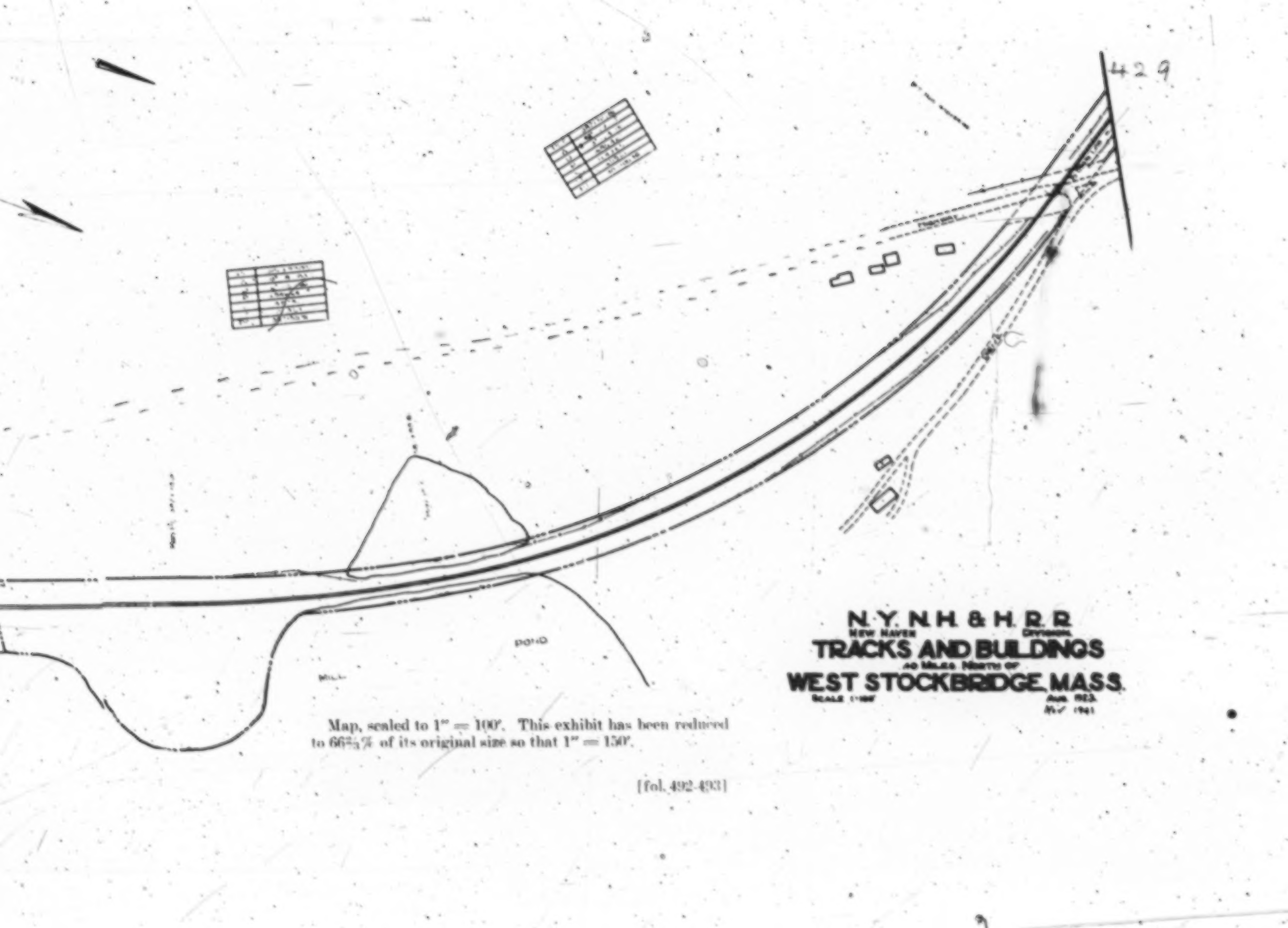
Defendants' Exhibit H.

C 2161
 Sept 3 H
 L. G. ...

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41	42	43	44	45	46	47	48	49	50
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61	62	63	64	65	66	67	68	69	70
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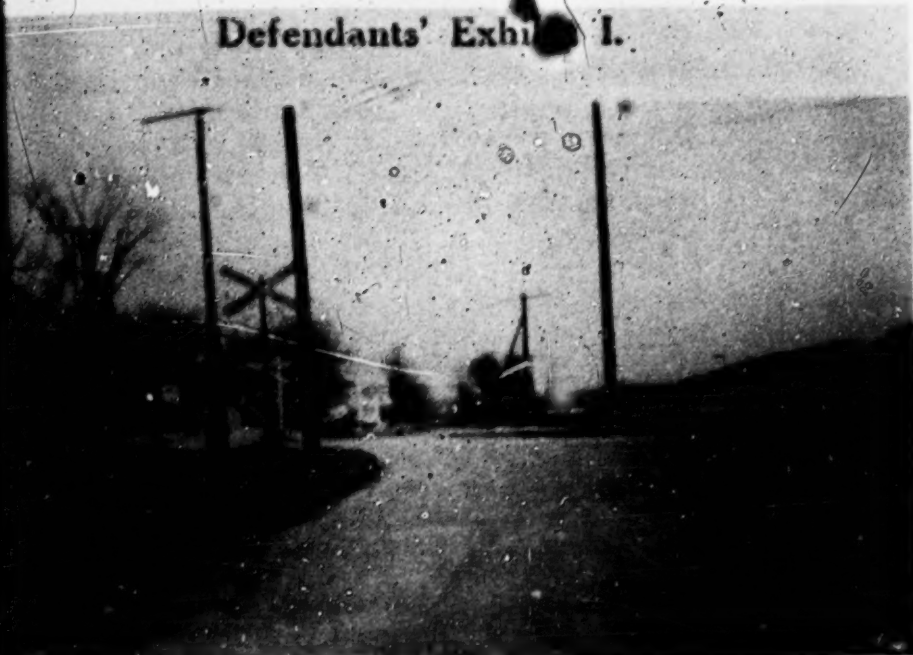
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61	62	63	64	65	66	67	68	69	70
71	72	73	74	75	76	77	78	79	80
81	82	83	84	85	86	87	88	89	90
91	92	93	94	95	96	97	98	99	100

N.Y. N.H. & H.R.R.
 NEW HAVEN DIVISION
TRACKS AND BUILDINGS
 40 MILES NORTH OF
WEST STOCKBRIDGE MASS.
 SCALE 1"=100' AUG. 1923
 REV. 1941

Map, scaled to 1" = 100'. This exhibit has been reduced
 to 66²/₃% of its original size so that 1" = 150'.

[fol. 492-493]

Defendants' Exhibit I.



Photograph showing center of Main Street crossing in West Stockbridge.

[fol. 494-495]

[fol. 496] DEFENDANTS' EXHIBIT J FOR IDENTIFICATION

Investigation in connection with Engine 438 being struck by an automobile while passing over Elkey Buckley Public Highway Crossing, Mileage 8.42 on State Line Branch, West Stockbridge, Mass.

Interviewed by Mr. J. W. Cuineen, Asst. Supt.

Present: Mr. E. T. Conley, Legal Dept.; Mr. W. E. Christie, Mass. Public Utilities Com.; Mr. S. Byrne, Lt. of RR. Police.

Stenographer: W. F. Hardy.

Pittsfield Freight Office, December 27th, 1940, 4:00 P. M.

Statement of Engineer Harold D. McDermott

Q. How long employed by the New Haven Railroad?

A. 33 years.

Q. In what capacity?

A. Fireman and Engineer.

Q. How long an Engineer?

A. 22 years.

Q. You are qualified on the characteristics of the Railroad between Pittsfield, Great Barrington, and State Line?

A. Yes, sir.

Q. You were engineer on engine 438 with Conductor Johnson on December 25th?

A. Yes, sir.

Q. What time did you leave Daly's?

A. 5:45 P. M.

Q. What did you have?

A. Engine and caboose.

Q. You were headed south?

A. Backing up.

Q. You had a back-up headlight on the tender?

A. Yes, sir, a good one.

Q. Where did you light it?

A. Daly's.

Q. Where was the caboose?

A. On the nose of the engine.

[fol. 497] Q. Then the tender of the engine was the first vehicle out?

A. Yes, sir.

Q. How many cars did you have leaving Pittsfield?

A. I really don't know.

Q. Did you use your air brake between Pittsfield and Daly's?

A. I don't remember.

Q. Had you used your air brake before the accident?

A. No.

Q. When you coupled onto the caboose at Daly's did you test your air?

A. No.

Q. Why not?

A. Just didn't, cut the air in and doubled the pressure.

Q. Did you make a running test?

A. No, sir.

Q. Approaching Weststockbridge, the first highway crossing north of the station what whistle signals were given for that crossing?

A. Regulation crossing whistle two long two short repeated.

Q. Where?

A. Whistling post and repeated to finish just as the engine hit the crossing.

Q. You have an automatic bell ringer?

A. Yes.

Q. When did you start it?

A. It was going all the way from the whistling post at the first crossing until after the accident happened.

Q. What was the weather condition?

A. Clear.

Q. How fast were you running between W. Stockbridge and where the accident occurred?

A. 15 m. p. h.

Q. When did you last observe that the light on the tender was burning?

A. When I put it out at State Line.

Q. It was burning after the accident?

A. Yes.

Q. When you were backing up did you notice any automobiles on your side of the crossing?

A. Yes, there was one on the hill approaching the crossing.

Q. Did you notice any on the other side?

A. No, I can't see the crossing on account of the tender.

Q. You only seen that one car standing there?

A. Yes. Just the one.

Q. What was the first intimation you had of the accident?
[fol. 498] A. I heard this peculiar notice and the fireman
hollered that we have got a car. I put the brakes in
emergency.

Q. Give her sand?

A. Yes.

Q. When the engine stopped how far was the engine
north of the crossing?

A. $1\frac{1}{2}$ to 2 pole lengths.

Q. What was the weather condition at that time?

A. Clear.

Q. After you stopped did you get off the engine?

A. I went back to see what damage was done.

Q. What did you find?

A. This Ford Coupe down the bank.

Q. Was it on its side?

A. I would say it was it was tipped at a ninety degree
angle.

Q. Which way was the auto traveling?

A. Toward West Stockbridge pretty near due east.

Q. Assuming that the Railroad is north and south as
your time table says which way would the automobile be
traveling?

A. Coming from the east going west.

Q. When you get back there what did you find?

A. This overturned Ford Coupe with this lady and
gentleman in it.

Q. Where was the lady when you seen her?

A. On the ground laying down. The door was open.

Q. Was she conscious?

A. No.

Q. Did you help to take her out of the car?

A. No.

Q. Was she alive?

A. Yes, she was breathing but unconscious. I don't know
how she got out on the ground.

Q. Did you help take the man out?

A. No, I did not.

Q. What was his position in the car?

A. He was pinned in by the steering wheel.

Q. Did you make any inspection of the engine?

A. Yes.

Q. What did you find?

A. The step on the tank bent and the step on the engine broken.

Q. That would indicate that he ran into the side of the tank and was not dragged or pushed by the front of the tank?

A. No, he hit with force to throw him against that pole and down the bank.

[fol. 499] Q. Did you notice any marks on that telephone pole?

A. No, I did not.

Q. Do you drive an automobile?

A. Yes.

Q. Have you driven over that crossing?

A. Every day going to work and going home daily as much as anyone.

Q. What kind of a road is it?

A. State Road, rough it isn't cement, macadam.

Q. In your experience in driving over that crossing how far back on the highway could you see a headlight of an approaching train?

A. Why a half a mile right near that house up there.

Q. There is a little bridge down there how far is that from the tracks?

A. 100 feet.

Q. You would be able to see a train from there and stop in time for it?

A. Yes, sir, if you had any brakes at all.

Q. Assuming that you were traveling 15-18 m. p. h. how long would it take you to stop?

A. About a car length.

Q. When you applied the brakes did they function perfectly?

A. Yes, sir, 100%.

Mr. Christie:

Q. From what you saw the man was the driver of the car?

A. Absolutely he was behind the wheel.

Q. Where was your engine when you applied the brakes?

A. I was over the crossing. I put the brakes on after he hit. It was all simultaneous. I heard the noise, the fireman hollered and I put the brakes on. Even if the fireman did not holler the action would have been the same.

Q. Your engine was in good mechanical condition?

A. Yes, sir.

I have read my statement consisting of 4 pages and it is true and correct.

(Signed) Harold D. McDermott.

Witnessed Edward J. Daly.

[fol. 500] **IN UNITED STATES DISTRICT COURT**

JUDGMENT—November 25, 1941

The above entitled action having duly come on for Trial on November 10, 12, 13, 17, 18 and 19, 1941, before Honorable Matthew T. Abruzzo, District Judge, and a jury at a Stated Term of the United States District Court for the Eastern District of New York, held at the United States Court House, Borough of Brooklyn, City and State of New York, and the issues having been duly heard and the jury on November 19th, 1941 having rendered a verdict in favor of Howard F. Hoffman, individually, plaintiff, and against the defendants in the sum of \$25,000.00, and also having rendered a verdict in favor of the plaintiff, Howard F. Hoffman, as Administrator of the goods, chattels and credits which were of Inez T. Hoffman, also known as Inez T. Spraker Hoffman, deceased, and against the defendants in the sum of \$9,000.00, and the defendants having duly moved to set aside said verdict and for a new trial, and the Court after due deliberation having denied defendants' said motion and costs of the plaintiffs having been duly taxed by the Clerk in the sum of Seventy-seven and 35/100 (\$77.35) Dollars,

On motion of Benjamin Diamond, Esq., attorney for plaintiffs, it is

Ordered, adjudged and decreed, that the plaintiff, Howard F. Hoffman, individually, do recover of the defendants, Howard S. Palmer, Henry B. Sawyer and James Lee Loomis, as Trustees for the New York, New Haven and Hartford Railroad Company, the sum of \$25,000.00, together with the sum of Seventy-seven and 35/100 (\$77.35) Dollars, his costs and disbursements as aforesaid, amounting in all to the sum of Twenty-five thousand and seventy-seven and 35/100 (\$25,077.35) Dollars and that the plaintiff, Howard F. Hoffman, as Administrator of the

goods, chattels, and credits which were of Inez Hoffman, also known as Inez T. Spraker Hoffman, deceased, do recover of the defendants, Howard S. Palmer, Henry B. Sawyer and James Lee Loomis, as Trustees for the New York, New Haven and Hartford Railroad Company, the sum of \$9,000.00, and that the plaintiffs have execution therefor.

Judgment entered this 25th day of November, 1941.

Percy G. B. Gilkes, Clerk of the United States District Court for the Eastern District of New York,
by J. G. Cochran, Deputy Clerk.

[fol. 502] UNITED STATES DISTRICT COURT

[Title omitted].

NOTICE OF APPEAL—February 20, 1942

SIRS:

Please take notice that the above named defendants, Howard S. Palmer, Henry B. Sawyer and James Lee Loomis, as Trustees for The New York, New Haven and Hartford Railroad Company, hereby appeal to the United States Circuit Court of Appeals, Second Circuit, from each and every part of the judgment herein in amount of Twenty-five Thousand and Seventy-seven and 35/100 Dollars (\$25,077.35), in favor of the plaintiff Howard F. Hoffman, individually, and Nine Thousand Dollars (\$9,000.00), in favor of the plaintiff, Howard F. Hoffman, as Administrator of the goods, chattels and credits which were of Inez Hoffman, also known as Inez T. Spraker Hoffman, deceased, entered in the office of the Clerk of the [fol. 503] United States District Court for the Eastern District of New York, on November 25th, 1941.

Dated, New York, February 20th, 1942.

Yours, &c., Edward R. Brumley, Attorney for Defendants, Office and Post Office Address, Room 3841, Grand Central Terminal, Borough of Manhattan, City of New York.

To: Benjamin Diamond, Esq., Attorney for Plaintiff, 1542 Flatbush Avenue, Brooklyn, N. Y. Hon. Percy G. B. Gilkes, Clerk, U. S. District Court, Eastern District of New York. Hon. Dimon E. Roberts, Clerk, U. S. Circuit Court of Appeals, Second Circuit.

[fol. 504] IN UNITED STATES DISTRICT COURT

POINTS ON WHICH DEFENDANTS INTEND TO RELY ON THE
APPEAL

Defendants intend to rely on the following points on the appeal:

I. The trial court erred in denying defendants' motion for the direction of a verdict on the following grounds:

(a) That plaintiff failed to prove any negligence on the part of the defendants;

(b) That the plaintiff-operator was guilty of contributory negligence in the common law action;

(c) That plaintiff was guilty of violation of §15, c. 90 of the General Laws of Massachusetts in the statutory action; and

(d) That plaintiff's action for his wife's estate is barred by reason of violation of §15, c. 90 on his part.

II. The trial court erred in charging the jury that the defendants had the burden of proving contributory negligence.

III. The trial court erred in refusing to charge Defendants' Request No. 16 that in the personal injury action, the plaintiff had the burden of proving freedom from contributory negligence.

IV. The trial court erred in refusing to charge Defendants' Request No. 11 that if plaintiff-operator violated §15 of c. 90 there can be no recovery for the death of his wife under §232, c. 160, and §3 of c. 229.

[fol. 505] V. The trial court made a fundamental error in charging the jury that irrespective of any statute, if the jury found that the defendant's employees on the train failed to give adequate and sufficient warning of the approach of this train toward the crossing, the jury might say that the defendants were negligent. Under the circumstances of this case the statutory provisions constitute the maximum measure of care demanded of the defendants.

VI. The trial court erred in refusing to admit in evidence statement of the engineer marked for Identification as Exhibit J.

VII. The trial court erred in holding that the demand and inspection of a statement made by plaintiff's witness L. M. Bona made it admissible for the producing party.

VIII. The trial court erred in not permitting the defendants in the direct examination of their witness Leon G. Adams to describe certain observations he made in respect of lines of sight, both in the daytime and at night.

IX. The trial court erred in refusing to allow defendants to put in evidence a lamp and bulb similar to the lamp and bulb on the engine on the night of the accident.

X. The trial court erred in limiting defendants' cross examination of plaintiff's witness N. M. Gennari as to the time that elapsed when she last saw the automobile and the time when she heard the collision.

XI. The trial court erred in refusing to allow defendants to ask their witness Frank T. Johnson his opinion as to [fol. 506] the cause of the damage to the locomotive which he described.

XII. The trial court erred in striking out the testimony of defendants' witness Frank T. Johnson as to whether the crew was in a hurry to reach the terminus of their run.

Edward R. Brumley, Attorney for Defendants, Office
& Post Office Address: Room 3841, Grand Central
Terminal, New York City, N. Y.

IN UNITED STATES DISTRICT COURT

ORDER FIXING AMOUNT OF COSTS AND SUPERSEDEAS BOND— December 31, 1941

A Judgment in the sum of Twenty-five Thousand and Seventy-seven and 35/100 Dollars (\$25,077.35) in favor of the plaintiff, Howard F. Hoffman, individually, and a judgment in the sum of Nine Thousand Dollars (\$9,000.00) in favor of the plaintiff, Howard F. Hoffman, as Administrator of the goods, chattels and credits which were of Inez Hoffman, also known as Inez T. Spraker Hoffman, [fol. 507] deceased, and against the defendants, having been entered in the office of the Clerk of this Court on the 25th

day of November, 1941; and the defendants being about to appeal to the United States Circuit Court of Appeals for the Second Circuit, to reverse said judgment, it is.

Now, on motion of Edward R. Brumley, attorney for said defendants,

ORDERED that execution of all proceedings in this suit be stayed pending the hearing and determination of the said appeal, and the coming down to this Court of the mandate of the United States Circuit Court of Appeals for the Second Circuit, upon the filing by the defendants of a costs and supersedeas bond for Thirty-six Thousand Five Hundred Dollars (\$36,500.00), approved by a Judge of this Court.

M. T. Abruzzo, United States District Judge.

IN UNITED STATES DISTRICT COURT

DEFENDANTS' DESIGNATION AS TO CONTENTS OF THE RECORD
ON APPEAL—Filed February 20, 1942

Spr:

Please take notice that in accordance with Rule 75 of the Federal Rules of Civil Procedure, defendants designate the contents of the record on appeal as follows:

1. Statement under Rule XIII of the United States Circuit Court of Appeals, Second Circuit.

2. Summons.

3. Complaint.

[Vol. 508] 4. Answer.

5. Bill of particulars.

6. Stipulation amending paragraphs first and second of the complaint.

7. Stipulation discontinuing action by the plaintiff, Hulda Hoffman.

8. Judgment.

9. Court stenographer's stenographic minutes of trial.

10. Defendants' requests to charge.

11. Charge.

12. Notice of appeal.

13. Order fixing amount of costs and supersedeas bond.

14. Statement of points on which defendants intend to rely on the appeal.

15. Exhibits.

Dated, New York, February 30th, 1942.

Yours, &c., Edward R. Brumley, Attorney for Defendants, Office and Post Office Address, Room 3841, Grand Central Terminal, Borough of Manhattan, City of New York.

To: Benjamin Diamond, Esq., Attorney for Plaintiff, 1542 Flatbush Avenue, Brooklyn, N. Y.

[fol. 309] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION AS TO EXHIBITS—March 2, 1942

It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto that Plaintiff's Exhibits 1 (letters of administration); 9 to 15, inclusive, (X-rays); and 16 (plaintiff's hospital and medical bills), need not be incorporated in the record on appeal, but may be handed up to the Court on the argument and used with the same force and effect as if incorporated herein.

Dated, New York, March 9th, 1942.

Edward R. Brumley, Attorney for Defendant-Appellants. Benjamin Diamond, Attorney for Plaintiff-Appellee.

[fol. 310] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION AS TO RECORD—March 2, 1942

It is hereby stipulated and agreed that the foregoing is the record on appeal in the above entitled matter as agreed upon by the parties.

Dated, New York, March 9th, 1942.

Edward R. Brumley, Attorney for Defendants-Appellants. Benjamin Diamond, Attorney for Plaintiff-Appellee.

[fol. 311] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 512] IN UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 261—October Term, 1941. (Argued May 7, 1942
Decided June 23, 1942)

HOWARD F. HOFFMAN, individually and as Administrator of the goods, chattels and credits which were of Inez Hoffman, also known as Inez T. Spraker Hoffman, deceased, Plaintiff-Appellee,

v.

HOWARD S. PALMER, HENRY B. SAWYER and JAMES LEE LOONIS as Trustees for the New York, New Haven and Hartford Railroad Company, Defendants-Appellants

Appeal from a judgment in favor of the plaintiff, Howard F. Hoffman, individually, in the amount of \$25,077.35, and as the administrator of the estate of his wife, in the amount of \$9,000.00, entered after a trial by a jury before the District Court for the Eastern District of New York.

Affirmed.

Before: SWAN, CLARK and FRANK, *Circuit Judges*.

Benjamin Diamond (William Paul Allen, Edward H. Wilson and Milton Dombroff, of Counsel), for Plaintiff-Appellee.

E. R. Brumley, for Defendants-Appellants.

OPINION—June 23, 1942

[fol. 513] FRANK, *Circuit Judge*:

Appellants, as trustees in reorganization of the New York, New Haven and Hartford Railroad Company, appeal from a judgment, entered upon a jury verdict, awarding \$25,077.35 to the plaintiff in his individual capacity and \$9,000.00 to him as administrator of his wife's estate. The action grew out of an accident which occurred at a grade crossing of the appellant railroad in West Stockbridge, Mass. On December 25, 1940, at about 6:15 P. M., the plaintiff was driving a Ford coupe, with his wife as a passenger, at this crossing, when the car was struck by a locomotive engine, causing severe and permanent injuries to

the plaintiff and the death of his wife. The complaint alleged that the railroad was negligent in failing to ring a bell or blow a whistle while approaching the crossing, and in failing to have a proper headlight; in view of the verdict, no issue is raised as to appellants' liability if the rulings on evidence and the charge to the jury were proper, and the alleged errors pertain exclusively to these matters. The alleged errors are four in number, and will be taken up seriatim.

1. Appellants urge that the judgment must be reversed because of the court's refusal to admit in evidence a statement signed by the locomotive engineer who was driving the engine when the accident occurred; the statement is in question-and-answer form and represents a stenographic record of an interview, two days after the accident, between the engineer and an assistant superintendent of the railroad. Present at the interview were two other employees of the railroad, and a Mr. Christie, of the Massachusetts Public Utilities Commission. The latter took only a minor part in the interview.¹ Appellants offered merely the engineer's statement, and offered to prove that "this statement was signed in the regular course of business and [fol. 514] that it was the regular course of such business to make such statement." The engineer was dead at the time of the trial. The statement was excluded, upon appellee's objection. Since the statement purportedly represents the engineer's version of the accident, it is urged that its exclusion was prejudicial to the defense. Its exclusion was proper, says appellee, because it offends the heresay rule.

The engineer's report would clearly be excluded under the common law rule. It does not come within the exceptions as to declarations by a deceased witness. *Shepard v. United States*, 290 U. S. 96; *People v. Sargano*, 212 N. Y. 231. Nor is it the kind of record that falls within the common law exception as to memoranda made in the regular course of business. For the courts—as an inherent and integral part of the "regular course of business" exception to the heresay rule—have always imposed this requirement, which the engineer's statement here clearly fails to meet: The person making the record, or supplying the information on which it is based, must have had no peculi-

¹ We shall further discuss this aspect of the matter, *infra*.

arly powerful motive to misrepresent; such a motive, if it exists must be relatively minimal and marginal. Wigmore, speaking of records made in the regular course of business, says:² "It is often added that there must have been no motive to misrepresent. This does not mean that the offeror must show an absence of all such motives; but merely to misrepresent is made to appear in a particular instance, the entry would be excluded."

This motive factor has often been stressed in the decisions. In *Cohner v. Seattle, R. & S. Ry Co.*, 58 Wash. 310, 25 L. R. A. (N. S.) 930, 105 Pac. 634, the facts were substantially the same as those in the instant case. There a report of an accident was made in writing by the conductor [fol. 515] of a street car, immediately following the accident, and was soon thereafter given to the defendant Street Railway Company in compliance with its rules. It was urged that the report was admissible "as an original entry made in the due course of the business of the company and made contemporaneously with the transactions recorded." In sustaining the exclusion of this evidence, the court said: "For the sake of argument, we may admit that the report was made in due course and in compliance with a rule and custom universally followed. Yet we are quite unable to see how the statements made in such report can escape the objection of being self-serving, in so far as they were favorable to appellant's contentions (and, of course, it was because they were so favorable that they were offered to support its contentions), being made by appellant's agent and in its interest concerning facts which the agent at the time of making them knew would most likely become matters of dispute and drawn into litigation. Indeed, it is evident that the very making of that report upon the facts surrounding the accident was prompted by the possibility of the respondent claiming the damages and suing the appellant therefor. . . . In this case the record of the facts, in the form of the conductor's report, was made for the very purpose of aiding appellant in possible future litigation with the respondent." The court distinguished an earlier case where the question of fact was whether or not a woman was a passenger upon a certain car during a certain trip,

² Wigmore, *Evidence* (3d ed. 1940) § 1527. cf. s. 1532(9) as to a common carrier's records.

she having testified that she had paid her fare by transfer slip; the conductor's trip report was there held admissible as having been made in the regular course of business. Speaking of that case, the court, in the *Conner* case, said: "We think a careful reading of that decision will show that the court did not regard the report as self-serving, for the reason that it was not made under circumstances when there were any inducements whatever to record the facts other [fol. 516] than as they actually occurred at the time. It was nothing more or less than a simple matter of bookkeeping in the usual course of business, without any thought of future litigation drawing the facts so recorded in question. It was by reason of the absence of such considerations at the time of making the report that it was there admitted in evidence." In *Bloom v. Union Railway Company*, 165 App. Div. 257, and *North Hudson Ry. Co. v. May*, 48 N. J. L. 401, 5 Atl. 276, the courts reached the same result on similar facts.

In the *Conner* case, the conductor's report was (1) made pursuant to a rule imposing a duty to make it and (2) was made in the "regular course of business"—using those words in their colloquial sense. But the court refused to give them such a colloquial meaning, since, if it did so, the foundation of the "regular course of business" exception would disappear. *Those words had come to be a shorthand expression or symbol for a doctrine, the essence of which is the reliance on records where the circumstances in which they were made furnish sufficient checks against inducements to misstate to make them trustworthy, give them "some badge of truthfulness."*

That basic concept is recurrently expressed in the cases. In *Freedman v. Mutual Life Ins. Co.*, 342 Pa. 404, 21 Atl. 81, 85 (1941) hospital records were held admissible where there were present "no contemplative motives for falsification." In *Fennerstein's Champagne*, 3 Wall. 145, 147, the court emphasized the ingredient that "there was no motive to falsify." In *Poole v. Dicās*, 1 Bing. (N. C.) 649, 131 Eng. Rep. 1267, Tindal, C. J., said: "The clerk had no interest to make a false entry: If he had any interest, it was rather to make a true entry: it is easier to state what is true than what is false; the process of invention implies trouble, in such a case unnecessarily incurred; and a false entry would be likely to bring him into disgrace with his employer. Again, the book in which the entry was made was open to

[fol.517] all the clerks in the office, so that an entry if false would be exposed to speedy discovery." In other cases, the absence of a motive to misrepresent is said to be "condition" of admissibility. See *Polina v. Gray*, L. R. 12 Ch. Div., 411, 429-430; *Lassone v. Boston & L. R. Co.*, 66 N. H. 345, 24 A. 902, 903-906, and cases there cited; *Malone v. L'Estrange*, 2 Ir. Eq. 16. In *Lord v. Moore*, 37 Me. 208, 220, the requirement was said to be that the entrant's situation "was such as to exclude all presumption of his having any interest to misrepresent the fact recorded." And Gray, J., in *Kennedy v. Doyle*, 10 All. 161, 167 (Mass., 1865) says that not only must there be "no interest to misrepresent," but also that the entry must be made "before any controversy or question has arisen."

The statement of the engineer may be compared to the "protests" of mariners, which, although made by them as a matter of duty and in the regular course of their business, are inadmissible on behalf of their ships because the courts have always recognized that these reports will be biased and partisan disclaimers of responsibility for a disaster. See, e.g., *Merriman v. The Maz Queens*, Fed. Cas. No. 9,481. In *Hand v. The Elvira*, Fed. Cas. No. 6,015, the court said that in such a document "the waves are almost always high, the winds never less than a hurricane, and the peril of life generally impending."

This court has often emphasized the element of trustworthiness as the foundation of the "regular course of business" exception. For instance, in *United States v. Cotter*, 60 F. (2d) 689, 693 (1932) where certain bank records were held admissible, we said that the accuracy of the records "is essential to the very life of [the bank's] business" and spoke of "the probable correctness of ordinary bank books," pointing out that "the danger of mistake is slight." In *United States v. Becker*, 62 F. (2d) 1007, 1010 (1933), we [fol. 518] said that "if challenged, the party offering the documents must prove that the system is such a prima facie to be reliable." These two cases, in turn, relied upon *Massachusetts Bonding & Insurance Co. v. Norwich Pharmacal Co.*, 18 F. (2d) 934 (1927) in which we referred to records that "are in practice accept as accurate upon the faith of the routine itself, and of the self-consistency of their contents."³

³ As shown below, we have consistently adhered to this same attitude in construing U. S. C. A. Title 28, §695.

The same "principle of a circumstantial guarantee of trustworthiness"—involving the absence of any vigorous motive to misrepresent—is inherent in virtually all the exceptions to the hearsay rule, such as declarations about private boundaries, statements or records concerning family history, spontaneous declarations, and dying declarations. We refer to some of the authorities in a footnote. In them, frequent reference is made to the non-existence of a controversy, likely to lead to litigation in which the declarant has a personal interest that would be likely to negate a fair degree of unprejudiced sincerity.⁴

⁴ In the exception as to *hearsay declarations concerning boundaries*, the courts hold that the declarant must have had "no interest to misrepresent" (Wigmore, loc. cit., § 1565) and the statement must have been made before a controversy commenced, or was imminent so that it could not have been induced thereby. *Mentz v. Town of Greenwich*, 118 Conn. 137, 171 A. 10, 13 (1934); *Scaife v. Western N. C. Land Co.*, 90 Fed. 238 (C. C. A. 4); *Robinson v. Dewhurst*, 68 Fed. 336, 338 (C. C. A. 4). It is said that the "commencement of the controversy" means the "arising of that state of facts on which the claim is founded," that the declaration must have been made before a period "when this fountain of evidence was not rendered turbid by agitation." *Pace v. McAden*, 191 N. C. 137, 131 S. E. 629, 631.

In the case of *dying declarations*, the solemnity of approaching death is said to free the mind "from all motives to misstate." Wigmore, *ibid.*, § 1438. Spontaneous declarations are admitted because made "when considerations of self-interest could not have been brought fully to bear by reasoned reflection." *Ibid.*, § 1747. The "utterance must have been before there has been time to contrive and misrepresent." *Ibid.*, § 1750. As one court has put it, the test is, "Were the facts talking through the party, or the party talking through the facts." *Cromeenes v. San Pedro*, 37 Utah 475, 109 Pac. 10.

We recently said that this same limitation was applicable to a *statement made by a patient to a physician*. *Meaney v. United States*, 112 F. (2d) 538. It is encountered as an integral part of the exception permitting the admission of declarations or entries by a deceased person relating to *family history* (pedigree). Such a declaration or entry (says Wigmore, *ibid.*, § 1482), to be admissible, must have

[fol. 519] Wigmore has summarized, approvingly, the following reasons justifying the several exceptions to the hearsay rule: "(a) Where the circumstances are such that a sincere and accurate statement would naturally be uttered, and no plan of falsification be formed; (b) where, even though a desire to falsify might present itself, other considerations, such as the danger of easy detection or the fear of punishment, would probably counteract its force; (c) [fol. 520] where the statement was made under such conditions of publicity that an error, if it had occurred, would

been made when "no special reason for bias or passion" existed—as Lord Eldon put it, when the declarant's mind stood "in an even position, without any temptation to exceed or fall short of the truth." *Whitelocke v. Baker*, 13 Ves. 514. Accordingly, that there existed, when such statements were made, a dispute likely to provoke litigation "more or less over the precise point to which the statements refer" leads to their exclusion, because then there is too much probability that bias affected them (Wigmore, *ibid.*, § 1483), and of their having been induced by the existence of the controversy. *In re Frey's Estate*, 224 N. W. 596, 599, (Ia.). In *Plant v. Taylor*, 7 H. & N. 237, it was said: "No case has been cited in which the declaration of a deceased person *obviously for his interest has been received.*" Of course, "the mere circumstance that the entry was made with a *view to perpetuating evidence* . . . should not exclude the entry; otherwise few such entries would be *re-levable.* . . ." But the absence of a strong motive to deceive must appear. Wigmore, *loc. cit.*, § 1484. In *Stein v. Bowman*, 13 Pet. 209, 220, the court said that such declarations to be admissible must be made "at a time, and under circumstances, when the person making them could have no motive to misrepresent the facts . . . It would be extremely dangerous to receive hearsay declarations in evidence, respecting any matter, after the controversy has begun. This would enable a party, by ingenious contrivances to manufacture evidence to sustain his cause." This limitation to the family history exception, writes Wigmore (*loc. cit.*, § 1483) "is entirely in analogy to the limitations in other exceptions, and so long as the hearsay rule is enforced in its present form, this limitation has a legitimate place."

probably have been detected and corrected.”⁵ And, with particular reference to those “regular course of business” memoranda which are, he says, justifiably admissible although hearsay, he writes:⁶ “They fall within the second general type already described (ante s. 1422) i. e., the situation is one where, even though a desire to state falsely may casually have subsisted, more powerful motives to accuracy overpower and supplant it. In the typical case of entries made systematically and habitually for the recording of a course of business dealings, experience of human nature indicates three distinct though related motives which operate to secure in the long run a sufficient degree of probable trustworthiness and make the statements fairly trustworthy: (1) The habit and system of making such a record with regularity calls for accuracy through the interest and purpose of the entrant; and the influence of habit may be relied on, by very inertia, to prevent casual inaccuracies and to *counteract the possible temptation to misstatements* . . . (2) Since the entries record a regular course of business transactions, an error or mis-statement is almost certain to be detected and the result by those dealing with the entrant; mis-statements cannot safely be made, if at all, except by a systematic and comprehensive plan of falsification (3) If, in addition to this, the entrant makes the record under a duty to an employer or other superior, there is the additional risk of censure and disgrace from the superior, in case of inaccuracies—a motive on the whole the most powerful and most palpable of the three.”

It is clear, then, that the words “regular course of business,” as used in the decisions, have always included the concept that the circumstances must be such as to safeguard against any crude bias on the part of persons making the records or supplying the information and against any great likelihood that the records may have been fabricated by interested persons for the primary purpose of use in litigation which is in prospect at the time. The mere fact that such entries were made with a view to perpetuating evidence is not sufficient to show such bias as to exclude them. But it is beyond question that a requirement in a business that reports should regularly be made which, by their very nature, are highly likely to be biased, did not

⁵ Loc. cit., § 1422.

⁶ Loc. cit., § 1522.

bring such reports within the meaning of the words of art, "regular course of business." That the defendant railroad here had a regulation requiring its employees, when they were the actors in accidents, regularly to make reports of such accidents for use in probable litigation, did not suffice to include such reports within the "regular course of business," as those words have always been understood by lawyers and judges. For the "regularity," which justifies the exception is the kind which tends to "counteract the possible temptation to mis-statements," as Wigmore has noted.⁷ It follows that the phrase "regular course of business" never covered a regular practice of making records with the purpose of supplying evidence in a highly probable law suit, when those records are made by persons with every "possible temptation to mis-statements." We have found no case holding or even suggesting that, absent a statute changing the common law rule, such a statement as the engineer's is admissible, loaded as it is with motives to misrepresent the facts.

The question, then, is whether this evidence, so plainly barred at common law, was made admissible by federal legislation, i. e., U. S. C. A. Title 28, § 695, enacted in 1936.⁸ [fol. 522] This statute renders admissible "any writing or record, whether in the form of an entry in a book or other-

⁷ See quotation, *supra*, from Wigmore, § 1522.

⁸ "695. Admissibility—In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of said act, transaction, occurrence, or event, if it shall appear that it was made in the regular course of any business, and that it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter. All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but they shall not affect its admissibility. The term 'business' shall include business, profession, occupation, and calling of every kind. (June 20, 1936, c. 640, § 1, 49 Stat. 1561.)"

wise, made as a memorandum or record of any act, transaction, occurrence or event," if the trial judge "shall find that it was made in the *regular course of any business*, and that it was the *regular course of such business* to make such a memorandum or record."

The words, "regular course of business," twice employed in the legislation, are not colloquial words but are words of art, with a long history, and, as we have observed, often theretofore judicially interpreted. Consequently, they should be given that settled meaning when incorporated in a statute, absent a contrary legislative intention clearly expressed in the statute or in its legislative history.

In *Case v. Los Angeles Lumber Co.*, 308 U. S. 106, 115, the Supreme Court said: "The words 'fair and equitable' as used in § 77B(f) are *words of art which* prior to the advent of § 77B had acquired a fixed meaning through judicial interpretations in the field of equity receivership reorganizations. Hence, as in case of other terms or phrases used in that section, *Duparquet Huot & Moneuse Co. v. Evans*, 297 U. S. 216, we adhere to the familiar rule that where words are employed in an Act which had at the time a well known meaning in the law, they are used in that sense unless the context requires the contrary. *Keck v. United States*, 172 U. S. 434, 436." In *Keck v. United States*, the court said: "These conclusions arising from a consideration of the text of the statute are rendered yet clearer by [fol. 523] taking into view the definite legal meaning of the word 'smuggling.' The term had a well understood import at common law, and in the absence of a particularized definition of its significance in the statute creating it, resort may be had to the common law for the purpose of arriving at the meaning of the word. *Swearingen v. United States*, 161 U. S. 446, 451; *United States v. Wong Kim Ark*, 169 U. S. 649."*

In a given context, words often come to have a meaning which they do not have in other contexts. What "apostles" mean in an admiralty rule¹⁰ would surprise a theologian. To a mathematician, pi is not a Greek letter, no more than

* See also *The Abbotsford*, 98 U. S. 440, 444; *Thorne v. Browne*, 257 Fed. 519, 523 (C. C. A. 8, cert. den. 250 U. S. 645); *Westerlund v. Black Bear Mining Co.*, 203 Fed. 599, 605 (C. C. A. 8).

¹⁰ See General Rule 44 of this court.

F. O. B. to a railroad company is a chance selection from the English alphabet. "Unearned" in the insurance trade, as used in connection with premiums, does not indicate what it does mean to a man on the street.¹¹ The phrase "divided into watches" in a Seaman's Act "is," says the Supreme Court, "to be given the meaning which it had acquired in the language and usages of the trade to which the Act relates . . ." and not "the common or ordinary meaning of the words."¹² To the manufacturers of drinks, beer is not a carbonated beverage although it is to a chemist.¹³ "Signed by the party to be charged or his agent" is a phrase with a history it cannot easily shake off, when employed in a statute.¹⁴ The words "equity receivership" do [fol. 524] not go virginally into a corporate reorganization statute.¹⁵ Each trade has its peculiar jargon and courts rely on that jargon when it finds its way into a statute dealing with that trade.

And so with "regular course of business" as applied to records or memoranda in an evidence statute. To a layman, the words might seem to mean any record or paper prepared by an employee in accordance with a rule established in that business by his employer. But according to the jargon of lawyers and judges those words, in discussions of evidence, have always meant writings made in such a way as to afford some safeguards against the existence of any exceptionally strong bias or powerful motive to misrepresent.

Those words came into the statute saturated with history. They connote—to recall Wigmore's comments¹⁶—(1) a regularity serving "to counteract the possible temptation to misstatements"; (2) a situation which would lead to detection of falsification, so that mis-statements "cannot safely be made"; (3) a relationship, when a writing is made

¹¹ *Mass. Ass'n v. United States*, 114 F. (2d) 304, 309 (C. C. A. 1).

¹² *O'Hara v. Luckenbach S. S. Co.*, 269 U. S. 364, 365-366.

¹³ *Carter v. Liquid Carbonic Pacific Corp.*, 97 F. 1 (C. C. A. 9). See also *Cadwalader v. Zeh*, 151 U. S. 171; *Hedden v. Richard*, 149 U. S. 346.

¹⁴ *Thorne v. Browne*, 257 Fed. 519, 523.

¹⁵ *Duparquet Huot & Moneuse Co. v. Evans*, *supra*.

¹⁶ See Wigmore, § 1522, quoted above.

by an employee under a duty to his employer, which includes the "risk of censure and disgrace" for mis-statements. It would, therefore, require unequivocal expressions in the statute or its legislative history to yield an interpretation of those words, defying their history, which would render admissible a memorandum made in circumstances that disclose the strongest likelihood of the existence of a motive to misrepresent and the least probability of censure from the employer who imposed the duty to make it, if the memorandum misdescribes the facts so as to favor him.

The statute was a so-called "Model Act," proposed for uniform adoption by the several states and the federal government. New York enacted it in 1928.¹⁷ In the next [fol. 525] year, long before Congress also enacted it, the New York statute was interpreted in New York in a case closely resembling the instant case and similar cases above cited; In *Needle v. New York Railways Co.*, 227 App. Div. 276 (1929), a policeman, in the course of his regular duties, made a report of a street railway accident. As he had not witnessed the accident, his report was based on the oral statements of others, including, as the court said, that "of the interested motorman who, instead of being so placed as to be presumed to be without a motive to falsify in helping to make the record, had every reason to give a biased and false report." It was held that the policeman's report was not admissible under the Model Act.

The court in the *Needle* case gave as another ground for its rejection that the report was based upon the statements of others than the motorman who were under no duty to make them and that the policeman's hearsay statement was founded upon the hearsay of others and not upon his own knowledge. With that aspect of the decision we are not concerned, for it has no bearing here. When herein we refer to the *Needle* case, we mean, unless we state otherwise, that part of the decision rejecting the motorman's statement because of the presence of that same motive to misstate which caused the rejection of the conductor's statement in *Conner v. Seattle R. & S. Ry. Co.*, *supra*, and similar cases.

It was in 1936, seven years after the *Needle* decision, that Congress adopted the Model Act. No change in its verbiage was suggested or was made to indicate an intention to devi-

¹⁷ C. P. A. § 374-a.

ate from that reasonable New York interpretation. It is a general rule that where a statute has been previously enacted in another jurisdiction, interpretations by its courts before its enactment in another jurisdiction are to be followed because the statute "generally is presumed to be adopted with the construction which it has received." [fol. 526] Holmes, J., in *James v. Appel*, 192 U. S. 135.¹⁸ And constructions adopted by other jurisdictions are peculiarly persuasive where the statute is designed to be "uniform." *Union Trust Company v. McGinty*, 212 Mass. 205, 98 N. E. 670; *Forgan v. Smedal*, 234 N. W. 896 (Wis. 1931); *Stewart v. Hansen*, 218 Pac. 959 (Utah, 1923). Of course this rule, like all rules of statutory construction, is not inflexible. We do not, therefore, necessarily feel bound to apply, to the federal statute, all the interpretations of the New York courts, if we find them highly unreasonable. But the ruling in the *Needle* case, we think, should be followed as entirely reasonable, absent most persuasive contrary arguments.

The draftsmen of the Model Act had not, before Congress enacted it, indicated that they meant that it should render admissible memoranda such as that excluded in the *Needle* case, i.e., those made in circumstances where the "regularity" lacked all possible safeguards or reliability. The draftsmen and sponsors of that Act consisted of a Committee (headed by Professor E. M. Morgan) appointed by the Legal Research Committee of the Commonwealth Fund, which reported its findings and recommendations in a volume, *The Law of Evidence: Some Proposals for Its Reform*, published in 1927. It was there said that the problem sought to be solved by the proposed statute was "the need of inducing the courts to give evidential credit to the books upon which the mercantile and industrial world relies in the conduct of business." And the chief criticism made by the Commonwealth Committee of the existing common law

¹⁸ See also *Tucker v. Oxley*, 5 Cranch. 34, 42; *Henrietta M. & M. Co. v. Gardner*, 173 U. S. 123, 130; *Metropolitan R. Co. v. Moore*, 121 U. S. 558; *United States v. Lecato*, 29 F. (2d) 695 (C. C. A. 2) with reference to a federal statute borrowed from New York; *Newton v. Employers Liability Assurance Corp.*, 107 F. (2d) 164, 167 (C. C. A. 4); *Birnbaum v. United States*, 117 F. (2d) 887 (C. C. A. 4). Cf. 59 C. J. 1065.

[fol. 527] rule was that because each clerk or bookkeeper involved in any transaction must be called or accounted for, any break in the very elaborate chain of a typical business system was fatal and thus, practically, rendered such evidence inadmissible in many cases. In support of this criticism, that Committee sets out in its report the chain of events in a large business house, showing that scores of persons—many of them unidentifiable, work on an order at various stages from the time it is sold until the customer is billed. One reading the report of the Committee might, therefore, reasonably assume that perhaps its chief purpose was the desire to avoid the necessity of proving each link of such a chain. At any rate, he would surely not think that the statute was designed to make admissible documents, like the motivated engineer's statement involved here, which (quoting again from the statute's sponsors, Morgan et al.) in no remote way resemble the kind of record "upon which the mercantile and industrial world relies in the conduct of business."

Certainly no lawyer reading the statute would suppose that its draftsmen intended that the hearsay statements which it renders admissible should be attended by nothing whatever to guard against misstatements. He must assume that the phrase, "regular course of business," was inserted—and twice—with some purpose. Acquainted with the hearsay rule, he must assume that the purpose was to retain some at least of the assurances which that phrase has always symbolized. But to interpret it so as to admit in evidence the engineer's statement here would be to strip that phrase of every vestige of its established connotation. For there can be no slight shadow of any guaranty against a "temptation to misstate" if the words as to memoranda "made in the regular course of business" refer to such reports of accidents—reports required by employers of employees who are participants in the accidents—since, almost inevitably, [fol. 528] the inclination of those employees will be to describe such accounts so as to make it appear that those employees and their employer were not at fault.

No one knew better than the sponsors of the Model Act—men like Wigmore and Morgan—the traditional significance of "regular course of business." *There can be no doubt that their intention was to widen the exception to the hearsay rule relating to such writings. But it is equally without doubt that they did not intend to abolish the exception and*

to substitute another, by giving that phrase a meaning precisely opposite to that which they well knew was its recognized meaning. If that had been their intention, they would surely have said so, either in the language of the Act itself or in their Report, in order to avoid misleading the lawyers in the legislatures asked to enact that statute. There is nothing whatever in the Report of the Commonwealth Committee even faintly intimating any purpose completely to do away with every one of the traditional safeguards against a motive to misstate in statements made in "the regular course of business." Nor is there anything in any subsequent comments of any members of that Committee showing that they had any such intention.

And we cannot impute such an unusual intention to Congress. If that was what Congress meant to do, "it would have been easy to say so."¹⁸ It would have been still easier to have omitted altogether the historic words. We must assume that Congress used them deliberately with recognition of their history. And we must so interpret them. We have no right to be generous with other people's words.

[fol. 529]—The statute, in describing the instruments which it renders admissible, says that they may consist of "any writing" whether "in the form of an entry in a book or otherwise." This was in line with the purpose to broaden the exception: Those words serve to remove any possible doubts as to the form of the writing, and of course we recognize and will give full effect to that intention. We say at once that the engineer's statement was not inadmissible merely because it was not an entry in a book or merely because it was otherwise informal in character. But, whatever their form, the statute requires that memoranda be in "the regular course of business." And the same comments apply to the statutory provision, "The term 'business' shall include business, profession, occupation, and calling of

¹⁸ See, e. g., *Farrington v. Tennessee*, 95 U. S. 679, 689; *Union Nat'l. Bank v. Matthews*, 98 U. S. 621, 627; *Baltimore & P. R. R. Co. v. Grant*, 98 U. S. 398, 403; *Vicksburg, S. & P. R. R. Co. v. Dennis*, 116 U. S. 665, 670; *United States v. Chase*, 135 U. S. 255, 259; *United States v. Koch*, 40 Fed. 250, 252; *Harrington v. Herrick*, 64 Fed. 468, 471 (C. C. A. 9; *Central Real Estate v. Comm'r*, 47 F. (2d) 1036, 1037 (C. C. A. 5).

every kind," and to the provision that, "All other circumstances of the making of such writing or record, including lack of knowledge by the entrant or maker, may be shown to affect its weight, but they shall not affect its admissibility." They were, also, in accord with the purpose of broadening the exception. But they disclose no purpose to exterminate the inherent character of the exception, i.e., to remove all safeguards theretofore connoted by "regular course of business." In the instant case, we may add, there was no lack of personal knowledge by the maker of the statement, the engineer, and the railroad business was undeniably within the statutory scope.

There are many persons who believe that the hearsay rule should be wiped out.²⁰ Perhaps they are right. But, in interpreting a statute embodying a limited amount of re-[fol. 530] form, we must not allow our personal preferences for a more extensive reform to govern our decision. It is our function to find out what Congress intended. If it did not go or want to go as far as we may think desirable, we are not justified in re-shaping the legislation to suit our personal wishes. Of course, there has always been and there always will be judicial legislation.²¹ But it should be

²⁰ Cf. Maine, *Village Communities* (4th ed, 1881) 295. It is a reprint of an article, *The Theory of Evidence*, first published in 1873.

There is today a dispute as to whether the hearsay rule and its corollaries derive solely from the jury system and a mistrust of the capacity of juries to deal with so-called "second-hand" evidence. For the older view, see Maine, loc. cit., 302; Thayer, *A Preliminary Treatise on Evidence* (1898) 47. Morgan maintains that much of "the law of evidence" stemmed from other sources than the jury system. But he concedes that the conventional thesis is a half-truth. And, in particular, he grants "that in framing some parts of the law governing hearsay, the courts have been consciously influenced by the fact that the tribunal to which the evidence is addressed is the jury." Morgan, *The Jury and The Exclusionary Rules of Evidence*, 4 Un. of Chi. L. Rev. (1937) 247, 255, 258; Morgan, *The Hearsay Rule*, 12 Wash. L. Rev. (1937) 1.

²¹ Holmes, J., in *Southern Pacific Co. v. Jensen*, 244 U. S. 205, 218, 221; cf. Gray, *The Nature and Sources of Law* (1900) §222; Thayer, loc. cit. 318, 319, 327, 331; Dicey, *Law*

cautious—"interstitial," Holmes called it.²² With respect to jury trials, there is still some room for judicial innovations.²³ However, some legal rules—and the hearsay rule is one—are too well established to permit the judiciary to modify them substantially. What Holmes said of consideration is pertinent: "A common law judge could not say I think the doctrine of consideration a bit of historical nonsense, and shall not enforce it in my court."²⁴ And that remark is peculiarly apposite when Congress has acted to introduce specific changes in the hearsay rule; the judges should not take such specific legislative action as giving them a license to legislate at large in that field. This is not [fol. 531] to say that courts should be niggardly in giving effect to a new policy set forth in a statute merely because the legislature has carelessly expressed itself. As observed by Holmes, J., in *Johnson v. United States*, 163 Fed. 30, 32 (1908): "The legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed. * * * It is not an adequate discharge of duty for courts to say: We see what you are driving at, but you have not said it, and therefore we shall go on as before." Mr. Justice Cardozo, citing the *Johnson* case, said in *Van Beeck v. Sabine Towing Co.*, 300 U. S. 342, 351, "There are times when uncertain words are to be wrought into consistency and unity with a legislative policy which is itself a source of law, a new generative impulse transmitted to the legal system."²⁵ But that does not mean that the courts are free

and *Opinion in England* (2d ed. 1914) 361-398, 483-484; Cardozo, *The Nature of The Judicial Process* (1921) 10, 103, 113, 146-149; Dickinson, *Administrative Justice and The Supremacy of Law* (1922) 122 note 22, 200 note 23; Clark, *The Function of Law in a Democratic Society*, 9 *Un. of Chi. L. Rev.* 393 (1942); *In re Barnett*, 124 F. (2d) 1005 (C. C. A. 2).

²² *Southern Pacific Co. v. Jensen*, *supra*.

²³ *Ex Parte Peterson*, 253 U. S. 300, 305-310.

²⁴ *Southern Pacific Co. v. Jensen*, *Supra*.

²⁵ The *Johnson* case has also been cited or quoted with approval in *United States v. Hutcheson*, 312 U. S. 219, 235; *Keifer and Keifer v. R. F. C.*, 306 U. S. 381, 391 note 4; cf. Stone, *The Common Law in the United States*, 50 *Harv. L. Rev.* (1936) 4, 13.

to read into a statute something at which the legislature was not driving.

As shown by the cases we previously cited,²⁶ no one would have questioned the correctness of the *Needle* decision, absent a statute over-ruling it. We have discovered no case, in any jurisdiction where the Model Act has been enacted, holding or intimating that the doctrine expressed in the *Needle* case has been expunged by that statute. We go further: We know of no decision construing that statute and of no comments by anyone to the effect that the Model Act renders admissible reports by employees (under regulations of their employers requiring such reports) of accidents in which those employees have been active participants. It is suggested that Morgan and Wigmore have said that it [fol. 532] was intended that such reports should be admissible. But we have been unable to find that either of them has ever published any such comments, i.e., that they have ever discussed the problem which is here before us, in a case arising under the statute, either vis a vis the *Needle* case or otherwise.

It is true that another New York case, *Johnson v. Lutz*, 253 N. Y. 124, has been criticized by these commentators.²⁷ There a policeman's report of an accident, based on the unsworn statements to him of bystanders, was excluded, as not admissible under the Model Act, where there was no showing, the court said, "whether they saw the accident and stated what they knew, or stated what some other persons had told them." The criticism of the case (as erroneously narrowing the scope of the statutory provision that lack of personal knowledge of the "entrant or maker" of the record shall not affect its admissibility) loses some of its force when it is noted that the A. L. I. commentator mistakenly states that the policeman's report was "based upon statements made to him by persons who claimed to have seen the accident," and that Wigmore makes a similar error in stat-

²⁶ See especially, for cases involving similar facts, *Conner v. Seattle R. & S. Ry. Co.*, *supra*; *Bloom v. Union Railway Co.*, 165 App. Div. 257; *North Hudson Ry. Co. v. May*, 48 N. J. L. 401, 5 Atl. 276.

²⁷ Wigmore, *loc. cit.*, §1530a, note 1; A. L. I. Code of Evidence, comment on Rule 214 (presumably by Morgan).

ing the facts.²⁸ The decision, moreover, was by a unanimous court, including Judge (now Chief Judge) Lehman, who had previously indicated that the regular entry exception [fol. 533] ought to be liberally construed,²⁹ and Chief Judge (later Mr. Justice) Cardozo, who had not only written in a similar vein,³⁰ but was also a member of the Legal Research Committee of the Commonwealth Fund, which sponsored the Model Act.

There is no occasion for us here to consider the merits of the *Lutz* decision. Indeed, we may, arguendo, assume it to have been wrong. For it has no bearing whatever on the case at bar. And if it be thought wrong,³¹ it is clearly distinguishable from the *Needle* case, *supra*, where the report was excluded because of the motorman's probable bias even though (a) he was, of course, familiar with the facts, (b) he was probably under a duty to state the facts to the investigating policeman, and (c) the policeman, acting officially, was disinterested. The *Needle* case was decided before the Court of Appeals decided *Johnson v. Lutz*, and there

²⁸ Since the court treated the *Lutz* case as one in which the bystanders were not shown to have had any personal knowledge of the facts, the ruling in that case was merely this: It is error to admit a written hearsay report made by A who is under a duty to make it, where (1) A has no personal knowledge of the facts and (2) bases his report on the statement of B who himself has no knowledge of the facts and (3) who, not in the regular course of B's business, states what was told him by C who (4) had personal knowledge of the facts but did not state them to B in the regular course of B's or C's business.

²⁹ *Technical Rules of Evidence*, 26 Col. L. Rev. (1926) 508, 518.

³⁰ New York City Bar Ass'n Lectures on Legal Topics, Vol. 3, 81, cited with approval by Wigmore, loc. cit., §1520.

³¹ It has been cited with approval in *Sadjak v. Parker-Wolverine Co.*, 281 Mich. 84, 274 N. W. 719 (1937); *Borucki v. MacKenzie Bros.*, 125 Conn. 93, 3 Atl. (ed.) 224 (1938), in jurisdictions where the Model Act has been adopted; it has been approved by several commentators. 7 N. Y. U. L. Q. (1930) 476; 43 Harv. L. Rev. (1930) 960, 961; cf. 25 Ill. L. Rev. (1931) 830.

can be no doubt that the court which decided the *Needle* case, excluding a policeman's report, would be even more ready to exclude the company's document here. It would do so not because of the reasons given in the *Lutz* case, and criticized by Wigmore and Morgan, but because of the existence of that strong motive to misrepresent on the part of the interested motorman, which, prior to the statute, had led to decisions excluding accident reports by conductors or similar employees in similar circumstances.³²

[fol. 534] Morgan, so far as we can discover, has never criticized the *Needle* case.³³ Wigmore has done so briefly in a footnote thus: ³⁴ "Highway injury; a police blotter containing a report of the police officer who did not see the affair but took the statement of various persons on arriving, excluded, following *Johnson v. Lutz*;³⁵ again directly contrary to the express words" of the statute. It is clear from his description of the facts of the *Needle* case that Wigmore dealt with them as if they were the same as those in the *Lutz* case. He overlooked entirely the crucial fact—differentiating *Needle* sharply from *Lutz*—that among "the various persons" in *Needle* was the highly "interested motorman" who "had every reason to give a biased and false report." That part of the opinion which turns on those facts Wigmore has never mentioned or criticized. It cannot possibly be said, therefore, that he has regarded that aspect of the case as "contrary to the express words" of the Act. It is difficult to believe that, had he noted that distinguishing factor, he would have criticized the decision. For as we have seen, he has underscored the absence of "a motive to misrepresent" as an integral and essential part of the "regular course of business" exception. Clearly every one of those guarantees of trustworthiness, justifying, according to Wigmore, the admission of such hearsay, in proper

³² *Conner v. Seattle & S. Ry Co.*, *supra*; *Bloom v. Union Railway Co.*, *supra*; *North Hudson Ry Co. v. May*, *supra*.

³³ The comments on the A. L. I. proposed Code do not discuss the *Needle* case.

³⁴ Wigmore, *loc. cit.*, §1530a, note 1.

³⁵ The *Needle* case was decided before the *Lutz* case reached New York's highest court; it did not, therefore, follow the *Lutz* case as there decided.

circumstances, was absent in the *Needle* case and is absent here.

With all that in mind, we construe the statute as not making admissible the engineer's statement which, by its very nature, is dripping with motivations to misrepresent. Accordingly, *we decide this and no more:*

[fol. 535] The statute does not permit the introduction in evidence of a heresay statement in the form of a written memorandum or report concerning an accident, if the statement was prepared after the accident has occurred, where the person who makes the memorandum or report knows at the time of making it that he is very likely, in a probable law suit relating to that accident, to be charged with wrongdoing as a participant in the accident, so that he is almost certain, when making the memorandum or report, to be sharply affected by a desire to exculpate himself and to relieve himself or his employer of liability.

We do not hold that the engineer's statement is inadmissible under the statute merely because it (1) was prepared to perpetuate evidence or (2) was made after litigation was imminent,³⁶ or (3) was not a formal document or an entry in a book.

The decisions of this court, both before and since §695 was enacted, have consistently high-lighted the absence of a powerful motive to misstate as a necessary factor to render admissible memoranda made in the regular course of business. Our decisions of that kind, when no statute was applicable, we have already cited.³⁷ In *Pressel v. New England Transportation Co.*, 91 F. (2d) 1019 (1937), a case arising under the New York statute (C. P. A. §374a) before the federal statute was operative, we sustained the lower court in rejecting a statement, citing the *Lutz* and *Needle* cases. Under the federal statute, §695, in *Hunter v. Derby Foods*, 110 F. (2d) 970, 973 (1940), where a death

³⁶ Even if a memorandum, otherwise within the statute, were made after litigation had begun, it would not, merely on that score, be inadmissible. See *United States v. Mortimer*, 118 F. (2d) 266.

³⁷ *United States v. Cötter*, *supra*; *United States v. Becker*, *supra*; *Mass. Bonding & Ins. Co. v. Norwich Pharmacal Co.*, *supra*.

certificate made by a coroner in the course of his official duty was held admissible, we referred to the statute and [fol. 536] also pointed out that the certificate would be admissible in the New York courts under a New York statute (C. P. A. §367), citing *Scott v. Empire State Degree of Honor*, 204 App. Div. 530. We also cited Wigmore, §1671, which is part of his chapter on the admissibility of official statements; he there says, §1632, that "an official duty exists to make an accurate statement, and . . . this special and weighty duty will usually suffice as a motive to incite the officer to its fulfilment . . . It is the influence of the official duty, broadly considered, which is taken as the sufficient guaranty of trustworthiness, justifying the acceptance of the hearsay statement." In *Ulm v. Moore-McCormack Lines*, 115 F. (2d) 492, 495 (1941), a marine hospital record, on a form of the United States Public Health Service, executed in the regular course of duty by an attending doctor, was held by us to be admissible. We there discussed §695 and Wigmore's criticisms of the *Lutz* case. Interpreting Wigmore's views of the Model Act, we said that its "objective, as Wigmore so lucidly explains, was to do away with the technical rulings which excluded records ordinarily used in business transactions when not formally identified by the makers." We referred to other New York decisions (not, however, mentioning the *Needle* case), and added: "But whatever should be the judicial attitude toward this statute, we do not think the cited New York cases are in point on the immediate issue here."³⁸ That decision was reaffirmed on rehearing in *Ulm v. Moore-McCormack Lines*, 117 F. (2d) 222 (1941); there we referred with approval to *Borucki v. MacKenzie Bros Co.*, 125 Conn. 93, 3 A. (2d) 224, where the Connecticut court, in [fol. 537] turn, quoted with approval from the *Lutz* case. In *Reed v. Order of United Commercial Travelers of America*, 123 F. (2d) 252 (1941), we held that a hospital record

³⁸ The New York Court of Appeals has reached similar results which indicate that the *Lutz* case does not stand in the way of a liberal construction of the statute where, as in the case of medical records, there are reasonable guarantees of accuracy. See, *People v. Kohlmeyer*, 284 N. Y. 366, 369; *Meiselman v. Crown Heights Hospital*, 285 N. Y. 389, 396. On the trustworthiness of hospital records, see Note, 40 Mich. L. Rev. 1105 (1942).

of an attending doctor's diagnosis of a patient's condition was admissible under §695. Coroners' records or hospital records may be made for the purpose of perpetuating testimony, but they are, ordinarily, not made by persons with impelling motives to misrepresent.

Certainly nothing in our decision in *United States v. Mortimer*, 118 F. (2d) 266, 269, 270 (1941) is inconsistent with our decision here. There we held admissible charts, purporting to show defaults in the payment of taxes, which had been prepared by a prosecution witness, Karcher, who was an experienced *public accountant*,³⁰ assisted by several aides of whom only one in addition to Karcher took the stand. We held that those charts were not rendered inadmissible because all of Karcher's aides were not called to testify, especially as there was testimony as to the manner in which the charts had been prepared. And we rejected the argument that they were inadmissible under §695 merely because they were made in preparing evidence for the trial. In so ruling, we said: "There are numerous cases holding admissible on the testimony of a supervising agent statement compiled from voluminous records according to a method once practicable and offering *reasonable guaranty of accuracy*, even though the supervisor had not examined each record himself." After referring to Section 695 and to cases involving the use of bank records, we went on to say: "Likewise *accuracy is the life of an accountant's business*, but the multitude of records cannot be checked by any one person alone. And here the system followed was not merely *likely to insure accuracy*, but apparently did so, [fol. 538] since the other side, far from discrediting the records, actually supported them. The trend in the courts is unmistakably to follow the method of ordinary business in assuming the validity, until discredited, of records daily accepted in commercial routine." There, as in all our other decisions construing and applying §695, we were careful to ascertain that the "regularity" in the "regular course of business" was such as to afford some "reasonable guaranty

³⁰ He was a *public accountant* and not a party to the suit or an agent of a party.

of accuracy" or something to show an absence of a vigorous motive to misstate.⁴⁰

We are, then, in no way to be understood as initiating restrictive interpretations of the statute or as retracting or modifying the favorable constructions we have given it in our previous decisions. Our decision here is no less liberal than the decisions of other state or federal courts interpreting the Model Act. For, to repeat, we know of no case in any court holding, or even intimating, that such an obviously motivated record as that here before us is admissible under that Act.

It is urged that if we stress to the extent we have done here the traditional limitation to exceptions to the hearsay rule—i.e., the absence of a strong motive to misrepresent—we will be reverting to a notion which went out of favor a century ago. Page after page of Wigmore's treatise goes to show that that limitation is not thus outmoded either in judicial decisions or according to Wigmore's views as to correct practice. Two years ago, this court, in *Meaney v. United States*, 112 F. (2d) 538, held that narrative statements made by a patient to his physician in describing his "history" are admissible, provided the trial judge decides that "the patient was consulting the physician for treatment and that alone"; we said (per Judge Learned Hand) that the warrant for the admission, in such circumstances, is that "the patient . . . has a motive to speak the truth" because "his treatment will in part depend upon what he says." And our recent decisions, above discussed, construing §695, are in accord with that view. It is also suggested that the rejection, many years ago, of the rule disqualifying interested witnesses from testifying, *subject to cross examination*, destroyed this rationale of exclusion of hearsay statements, *not subject to cross examina-*

⁴⁰ Some suggestion has been made that our decision will render inadmissible entries in a ship's log. Before the 1936 statute, the rule seems to have been that such entries were generally, not admissible on behalf of the ship. See, e.g., *Worrall v. Davis Coal & Coke Co.*, 113 Fed. 549, 557; *The Kentucky*, 148 Fed. 500, 504; 11 C. J. 1186; 22 C. J. 902.

Whether the circumstances in which log entries are usually made render them admissible under the statute, we do not here consider.

tion, when made with strong motives to misrepresent. The two kinds of evidence are surely of a markedly different character, as has been recognized by the courts which, for about a century, have admitted the first while excluding the second.

It is further suggested that, if we hold that the extent of the motivation here is so great as to preclude adequate trustworthiness, we will be erecting an unworkable standard, as it will involve questions of degree. Even if it did, that would be nothing new, for the cases cited show that, for decades and up to now, the courts have been able to apply such a standard; in *Massachusetts Bonding & Insurance Company v. Norwich Pharmacal Co.*, 18 F. (2d) 934, 937, we said: "The question, as we view it, like many other questions as to the competence of evidence, is of degree, and is not susceptible of absolute regulation."⁴¹ But our decision here raises no such problem; we are not leaving the extent of the disqualifying motive under §695 at large or entrusting discretion with respect to it to the trial judge; for, as we have said, we decide merely this: The statute does not render admissible a hearsay statement made by an employee understanding orders from his employer to make reports of accidents in which the employee is a participant, where the primary purpose of the employer, obvious from the circumstances, in ordering those reports is to use them in litigation involving those accidents.

To avoid possible misunderstanding, this should be added: Appellants did not suggest in the court below or in this court that the presence of Mr. Christie, a representative of the State Utilities Commission, when the engineer was interviewed, endowed the engineer's statement with an

⁴¹ Cf. *Meaney v. United States*, 112 F. (2d) 539, 541 (C. C. A. 2).

The Supreme Court has often said that many legal decisions turn on matters of degree. See, e.g., *Harrison v. Schaffner*, 312 U. S. 579, 583; *Irwin v. Gavitt*, 268 U. S. 1; *Ingo v. Koch* — F. (2d) — note 6 (C. C. A. 2, April 15, 1942); dissenting opinion in *Chrestensen v. Valentine*, 122 F. (2d) 511, 520 (C. C. A. 2), reversed in *Valentine v. Chrestensen*, U. S. ; *Santa Cruz Co. v. Labor Board*, 303 U. S. 453, 467; *Kirschbaum v. Walling*, U. S. (June 1, 1942).

official status."^{11a} The sole offer of proof at the trial concerning this matter reads as follows: "The defendants offer in evidence the statement of the engineer, who the proof indicates is now dead, a statement taken in the regular course of business, the defendant claims, after the accident happened. The statement was signed by the engineer, and is marked for identification as Exhibit J, under §695 U. S. C. A. 28. The defendants offer the proof also that this statement was signed in the regular course of any (sic) business, and that it was the regular course of such business to make such statement." In appellants' brief in this court, appellants state their argument as to the alleged error in excluding this statement, as follows: "The defendants offered this statement in evidence under the provisions [fol. 541] of 28 U. S. C. A. §695. Defendants offered proof that the statement was signed in the regular course of business and that it was the regular course of such business to make the statement." The brief then quotes §695 and continues: "This court has passed upon this section in several cases . . .," citing authorities interpreting that statute. §695 does not differentiate, in any way, between reports made by public officials and reports made by others. Appellants have not in their briefs referred to the Massachusetts statute requiring its Utilities Commission to make reports as to railroad accidents, nor to the presence of Mr. Christie, the Commission's representative, at the interview with the engineer.

It is thus plain that the engineer's statement has not been asserted by appellants to be, or offered by them as, the report of a public official, or as being admissible as part of such a report.^{11b} Moreover, we do not know whether or

^{11a} Chapter 159, §29 of the General Laws of Massachusetts (1932) provides that an inspector of the Department of Public Utilities shall "investigate as promptly as may be any accident upon a railroad or railway or resulting from the operation thereof, which causes the death or imperils the life of any person, and shall report thereon to the Department, which shall investigate the cause of any such accident resulting in loss of life, and may investigate any other accident."

^{11b} Had they introduced such an official report embodying the engineer's statement, the case would, perhaps, have been

not Mr. Christie was a designated official investigator. If he was, we do not know whether or not he made his official report after attending this interview. If he did, we have no way of knowing what reliance, if any, he placed upon the answers here given by the engineer. Perhaps, if he made a report, it was damaging to appellants' case. The admissibility of an unoffered and perhaps non-existent official report does not serve to make admissible a statement which is not an official report, so that exclusion constitutes reversible error.

Even if we were to assume—contrary to fact—that appellants were in this court urging the admission of a public officer's report or urging that the engineer's statement had something of the status of a public official's report, there [fol. 542] would be this added difficulty: It would have been incumbent upon appellants to have brought such matters to the attention of the trial court and to have preserved their offer of proof, made on that basis, for appeal. Such an offer of proof, while provided for by F. R. C. P. 43 (cf 3 *Moore's Federal Practice*, 3076-3077), is not absolutely essential, if it is otherwise entirely clear what the alleged error is. *Meaney v. United States*; *supra*. But where, unlike the *Meaney* case, the significance of the excluded evidence is not obvious, we could not be expected to reverse on the mere possibility that the exclusion was harmful. *Gantz v. United States*, 127 F. (2d) 498, 503 (C. C. A. 8); *Herencia v. Guzman*, 219 U. S. 44, 46. That question, however, is not before us, since, as we have seen, appellants on this appeal have urged merely that the statement was admissible under §695, and have made no effort whatever to tie it to the tail of an official kite.

It is intimated that, as the defendant offered to prove that the engineer's statement was "signed in the regular course of business and that it was the regular course of business to make such statement," we must assume that appellants offered to prove and could have proved that the statement came within the statute as we have interpreted it. But the engineer's statement is in the record, and we know, from the evidence, that the engineer was a party to

much like the *Needle* case where the policeman's report embodied the statement of the interested motorman. But this question is not before us.

the accident. No proof, then, was possible that he did not have the peculiarly strong motive to misrepresent of the kind of which, we hold, precludes its admission.

Finally, it is argued that the death of the engineer, making his testimony unavailable, should induce an unusually liberal interpretation of the statute. But, if the statement otherwise came within the statute, it would be admissible regardless of whether the engineer were still alive. As the statute says nothing as to death as a basis for admission, [fol. 543] that fact adds nothing, unless at common law it is an independent ground for admission. As we have seen, it is not. There is a suggestion that the American Law Institute is this year recommending the enactment of a new Code of Evidence⁴² which—if Congress were to adopt it—would unquestionably render admissible the engineer's statement solely because he is dead.⁴³ But a proposed statute gives courts no authority. It is for us to construe and apply the existing enactment, not one which would enlarge it and which is, as yet, but a wish. Nor is it our function to write into our decisions the provisions of that proposed Code, several of which are at variance with Supreme Court decisions. Moreover, if the A. L. I. Code were in effect, it would give the trial judge discretion to exclude evidence such as the engineer's statement here, "if he finds that its probative value is outweighed by the risk that its admission will . . . create substantial danger . . . of misleading the jury."⁴⁴ By this simple provision, there would be solved a problem bothersome to some of our evidence-law reformers, i.e., how to liberalize the hearsay rule extensively in non-jury cases without automatically extending the liberalization in its entirety to jury cases.⁴⁵ But if

⁴² It should be pointed out that this Code is not, like most of the American Law Institute's work, a "restatement" of existing "law," but is frankly a proposed revision calling for new legislation; thus the Institute recognizes that many of the Rules in the Code are not now accepted by the courts.

⁴³ Under the A. L. I. proposed Code of Evidence, Rule 303(a) "evidence of a hearsay declaration is admissible if the judge finds that the declarant is unavailable . . ."

⁴⁴ See A. L. I. Code, Rule 303.

⁴⁵ Cf. the English Evidence Act of 1938, i.e., 1 & 2 Geo. 6, Ch. 28, §1. It renders admissible, among other things,

[fol. 544] appellants' construction of §695 were correct, the trial judge here would have had no such discretion.

2. One of plaintiff's witnesses testified on cross-examination that, before this trial, he had given a written statement to plaintiff's attorney. Defendant's attorney, at the trial, asked for that statement. He was admonished by the trial judge that, if he looked at it, it would be admissible, should plaintiff's counsel then choose to offer it. In view of that ruling, defendant's counsel withdrew his request, but under protest. Error is assigned as to that ruling.

The Doctrine that such a request makes such a document admissible has a long history.⁴⁴ The courts of some jurisdictions still adhere to it; others have rejected it. The New York courts are in the latter class. See, e. g., *Smith v.*

any hearsay statement when it "forms part of a record purporting to be a continuous record" and consists of information "supplied by a person who had, or might reasonably be supposed to have, personal knowledge," if the maker is dead. But the Act provides, "Nothing in this section shall render admissible any statement made by a person interested at a time when proceedings were pending or anticipated involving a dispute as to any fact which the statement might tend to establish." It also provides that "where the proceedings are with a jury, the Court may, in its discretion, reject the statement notwithstanding that the requirements of this section are satisfied with respect thereto, if for any reason it appears inexpedient in the interests of justice that the statement should be admitted." It would seem that a factor which the court may take into account when deciding whether to withhold such a hearsay statement from the jury is "whether the maker had any incentive to conceal or misrepresent." While that is one of the factors which, generally, is to affect the weight of the statement and not its admissibility, yet a reading of the statute indicates that, perhaps in jury cases, the court may consider it also in deciding whether to allow the statement go in evidence.

See *Hearsay and the English Evidence Act*, 1938, 34 Ill. L. Rev. (1940) 974.

The jury is little used in England. Cf. *Note*, 34 Ill. L. Rev. 236, note 2.

⁴⁴ Wigmore, loc. cit., §2125.

Rents, 131 N. Y. 169. But F. R. C. P. 43(a) provides that "the rule which favors the reception of the evidence governs." And the doctrine, supporting the ruling of the trial judge here, was approved, more than fifty years ago, by Judge Lacombe, sitting in the Circuit Court for the South-[fol. 545]ern District of New York, in *Edison Electric Light Co. v. U. S. Lighting Co.*, 45 Fed. 55, 59 (1891).⁴⁷ Relying on that decision,⁴⁸ the doctrine was applied in *McCarthy v. Palmer*, 29 Fed. Supp. 585 (1939, affirmed on other grounds by this court in 113 F. (2d) 721) despite the intervening adoption of the Federal Rules of Civil Procedure.⁴⁹

That doctrine has never been endorsed by the United States Supreme Court. It grew up as a branch of what was once a "fixed principle" of the common law "that a party was to be kept in the dark as to the tenor of evidence in his opponent's possession."⁵⁰ Several explanations of that "principle" have been given. It is said that it stems from the "sporting theory of justice," according to which a trial is regarded not as a means of ascertaining the true facts of the case but as a game of wits between opposing counsel.⁵¹ Another explanation is that the "principle" was founded on the belief that to surrender one's evidence before its disclosure at the trial would enable an unscrupulous adversary to fabricate counter-evidence.⁵² These explanations—like most efforts to explain habits and customs—are, probably, alone or together, only partially correct.⁵³

⁴⁷ Cf. *Wilkes v. Elliott*, Fed. Cas. No. 17,660; *Coots v. U. S. Bank*, Fed. Cas. No. 3,203; *Waller v. Stewart*, Fed. Cas. No. 17,109; 22 C. J. 965-966.

⁴⁸ It had been questioned in 1902, in *Worrall v. Davis Coal & Coke Co.*, 113 Fed. 549 (S. D. N. Y.).

⁴⁹ For a criticism of the *McCarthy* case, see Note, 53 Harv. L. Rev. (1940) 882.

⁵⁰ Wigmore, loc. cit., §2215.

⁵¹ Wigmore, loc. cit., § 1845; cf. *In re Barnett*, 124 F. (2d) 1003, 1110 (C. C. A. 2).

⁵² *Sunderland, Scope and Method of Discovery Before Trial*, 42 Yale L. J. (1933) 863, 867-868.

⁵³ For the need of caution in any historical study because of the difficulty, among others, of recapturing the unrecorded motivations in times past, see *Hume v. Moore-McCormack Lines*, 121 F. (2d) 336, 346 and note 38 (C. C. A. 2).

[fol. 546] A counter "principle" has asserted itself; a movement for liberal pre-trial discovery developed and has gained more and more momentum. The resistance to that movement has been ascribed by Wigmore in large part to fear that "the reduction of litigation to a small compass, in time and expense, would diminish the emoluments of the professional men at law—whether as attorneys or counsellors or as other officers of court depending upon the number and amount of fees."⁵⁴ Doubtless such an economic factor has been a partial element in the opposition to the reform. But here, as in many other situations, it will not do to overstress the pecuniary element. In all respects of life there is resistance to change, sometimes rational and sometimes not. There is a social as well as a physical inertia. Social inertia, when irrational, is usually not explicable solely in terms of pecuniary motives; often such motives are absent or subsidiary. The non-economic irrational components of such inertia are multiple:⁵⁵ There is a feeling of pleasure in identification with customary forms; there are emotional disturbances in the face of innovations calling for new adjustments: the new is dangerous, and "not to venture is not to lose." Our Declaration of Independence expressed a profound truth: "All experience hath shewn that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed." There are non-economic vested interests—vested interests in prestige or in illusions, for example.⁵⁶ Physiological and psy- [fol. 547] chological bases for hostility to change have been suggested.⁵⁷ Perhaps the anthropologist, dwelling on the

⁵⁴ Wigmore, loc. cit., § 1845. Cf. *Kulukundis Shipping Co. v. Amtorg Corp.*, 126 F. (2d) 978, 984 note 16 (C. C. A. 2); *United States v. Forness*, 125 F. (2d) 928, 934 note 9a (C. C. A. 2).

⁵⁵ See Stern, *Resistances to the Adoption of Technological Innovations*, in *Technological Trends and National Policy* (National Resources Committee, 1937) 39.

⁵⁶ Cf. Santayana, *Winds of Doctrine* (1926 ed.) 198.

⁵⁷ Cf. Barry, *The Scientific Habit of Thought*; Stern, loc. cit. 60; Vaibinger, *The Philosophy of "As If"* (transl. 1925), on the "equilibratory tendency of the mind"; Rignano, *The Psychology of Reasoning*, Chap. I.

way in which some customs irrationally persist,⁵⁸ comes closest to supplying an answer: "Culture traits," which originally may or may not have had any utility, sometimes endure regardless of whether they have present social value. "In a certain island in Oceania," writes Benedict,⁵⁹ "fish-hooks are currency and to have large fish-hooks came gradually to be the outward sign of great wealth. Fishhooks are therefore made very nearly as large as a man. They will no longer catch fish, of course. In proportion as they have lost their usefulness, they are supremely coveted." Benedict remarks that all societies, including our own, have their equivalents of such fishhooks.⁶⁰

With special reference to proposed changes in legal rules, there should not be neglected the devotion found in some members of any professional group to the established professional rituals. One need not go as far as does Seagle [fol. 548] in underscoring the effects of professionalism on the "law"⁶¹ to agree with him that many lawyers oppose innovations in legal techniques without regard to their social desirability, and devise rationalizations to support

⁵⁸ A subject which Montaigne illuminated in the 16th century and Roger Bacon before him in the 13th. See 1 Montaigne's *Essays* (Hazlitt ed. 1892) Ch. 22; 2 McKeon, *Selections From Medieval Philosophers* (1930) 8-9.

⁵⁹ *The Science of Custom* (1929) reprinted in Calverton, *The Making of Man* (1931) 805, 813-815. See Sumner, *Folkways*.

⁶⁰ As Maitland remarks, "superstitions look odd when they have ceased to be our superstitions." Cf. Montaigne, loc. cit., 102, 105.

Maine said that economists "greatly under-rate the value, power and interest of that great body of custom and inherited idea which, according to the metaphor which they have borrowed from the mechanicians, they throw aside as friction." *Village Communities*, 233.

Cf. Spencer, *The Study of Sociology* (1873) 97-99, 126-131.

⁶¹ *The Quest for Law* (1941) XV, 86, 96, 100-101, 136; cf. Maine, *Village Communities*, 250-260.

Seagle might have noted that precisely the same manifestations are found in the medical profession. See Stern, *Social Factors in Medical Progress* (1927).

their prejudices.⁶² We hear some of them complaining that the new Federal Rules of Civil Procedure, with their hospitality to pretrial discovery, have engendered fraud and perjury. The answer is that no one knows. Unfortunately, there were perjury and coaching of witnesses in the old days; no data is available to show whether those evils have waxed or waned in these newer days. Some lawyers also grumble, saying that it is "unfair" that a lawyer who has diligently prepared his case should be obliged to let counsel for the adversary scrutinize his data. But the reformers are surely right in replying that "unfairness" to a diligent lawyer is of no importance as against much-needed improvement in judicial ascertainment of the "facts" of cases; the public interest in such ascertainment is paramount. The supporters of liberality in discovery assert that it tends to bring about settlements and to reduce litigation.⁶³ Whether that is true again we do not know; the experiment is now in full operation but the returns are not yet in.

At any rate, the old "fixed principle" of keeping the opponent in the dark as to the tenor of the evidence in one's possession is now out of date. The appendant rule here in question is equally so. It is as anachronistic as the buttons [fol. 549] on the sleeve of a man's coat; but such a legal rule is more important than coat-sleeve buttons. As it cannot be reconciled with the liberality as to depositions and discovery contained in the new Rules,⁶⁴ we reject it. The judge should have dealt with the request as if it had arisen under F. R. C. P. Rule 26(b).

Nevertheless, we do not reverse here for error in the trial judge's ruling, for these reasons: (1) The written statement of the witness could, at most, have been used for purposes of impeachment. As that statement is not in the record before us, it is impossible for us to know whether it contained

⁶² Note the resistance, at this moment, of the admiralty bar, to the open recognition of the elimination of new trials on appeals in admiralty cases. Cf. *Pettersen L. & T. Corp. v. N. Y. Central R. Co.*, 126 F. (2d) 992, 994-998 (C. C. A. 2).

⁶³ Wigmore, loc cit., § 1845.

⁶⁴ Cf. Moore, 2 *Federal Procedure*, 1941 Supplement, p. 102.

any remarks contradicting the witness' testimony at the trial so that it would have served for impeaching purposes. If counsel wanted to assign error, he should have asked the trial judge to certify that statement to us, as part of the record on appeal. Since the statement is not before us, the result, if we were to reverse, would be to send the case back on the mere chance that the statement may contain matter which would have led to such an impeachment of the witness as materially to affect the jury's verdict. A verdict should not be so lightly disturbed. (2) Moreover, we cannot say that the trial judge or appellants' counsel was unreasonable in relying on Judge Lacombe's decision in the *Edison Electric* case. (Certainly appellants' counsel was not surprised, since it happens that he had, on behalf of the same clients he represents here, successfully persuaded the judge to render the decision in *McCarthy v. Palmer*, *supra*.) In the circumstances, it would be unwise to overturn a verdict because of the erroneous ruling on this point.

3. The next exclusionary ruling complained of is the court's refusal to permit Adams, a civil engineer in appellant's employ, to describe certain observations made by him [fol. 550] at the scene of the accident but long after its occurrence. Appellee had testified that the accident occurred on a dark but clear night, and that although he had come to a full stop about 15 or 20 feet from the track before proceeding, he had not observed the engine. Adams was allowed to testify from a map prepared by him as to the physical location of various objects at or near the crossing. He then testified that he went to the crossing some ten months after the accident, both during the daytime and on "a clear night without a moon, as I recall it," and observed the scene. The judge did not allow him to testify to what he could see when standing at various distances from the crossing, and appellant urges that this constitutes prejudicial error.

It should be noted that Adams was testifying as an observer rather than as an expert, and that even an expert may not state his opinion as to matters of common knowledge. *First Trust Co. v. Kansas City Life Ins. Co.*, 79 F. (2d) 48, 54; *Farris v. Interstate Circuit*, 115 F. (2d) 409, 412; *United States Smelting Co. v. Parry*, 166 Fed. 407, 410-415. Nevertheless, his observations probably would

have been useful, and should have been admitted, if it had been shown that he could testify to observations made under identical circumstances as those prevailing on the night of the accident. But it does not appear that the visibility was the same, that he was in a similar automobile, that the engine he observed was moving at the same speed or had a headlight of comparable power or design. Unless these conditions were comparable, it can hardly be argued that exclusion of his observations was a fatal error. We are confirmed in this view by the fact that the jury was not thereby deprived of any guide to gauge the visibility. For Adams was allowed to testify fully to what the physical conditions at the crossing were, and both sides introduced photographs which indicated the lay of the land. Under [fol. 551] the circumstances the jury could have made an intelligent estimate themselves, so that it cannot be argued that the exclusion of Adams' observations left them to grope in the dark.

4. The only remaining issue is whether the judge was correct in charging that the burden of proving contributory negligence was on the defendant. In so charging, he was following Federal Rule of Civil Procedure 8(c). It is argued that we should disregard that Rule because burden of proof is a matter of "substance," and hence cannot be altered by court rule. There is no necessity here of considering the argument. For if we were to reject the Rule, we would then turn to the decisions of the New York courts, including those relating to conflict of laws. *Erie R. Co. v. Tompkins*, 304 U. S. 64; *Klaxton v. Stentor*, 313 U. S. 487. While, with respect to intra-aural transactions, New York courts hold that the burden of proof is on the plaintiff, in a case such as this, they would apply, as a matter of conflict of laws, the Massachusetts law. *Fitzpatrick v. International Ry. Co.*, 252 N. Y. 127. And it happens that the Massachusetts rule coincides with Rule 8(c). See General Laws of Massachusetts, § 85, c. 231.⁶⁵

The judgment is affirmed.

⁶⁵ We are spared the necessity of considering the problem which would arise if, refusing to apply F. R. C. P. 8(c) on the ground that the burden of proof is not procedural but a matter of substantive law, we found that the New York courts refused to apply the Massachusetts law on the ground

CLARK, *Circuit Judge* (dissenting):

I. I am much disturbed by the restriction here read into the remedial statute, 28 U. S. C. A. § 695, in supporting the exclusion of the stenographic report of the engineer's examination by officials of the railroad and of the Massachusetts Public Utilities Commission.¹ This seems to me directly opposed to the intent of the statute, as shown by its plain terms as well as its history and background; and I suggest that the majority opinion demonstrates as much. Moreover, the decision sets aside quite peremptorily the reasoning of several unanimous decisions of this court. *Hunter v. Derby Foods, Inc.*, 2 Cir., 110 F. 2d 970, 133 A. L. R. 255; *Ulm v. Moore-McCormack Lines*, 2 Cir., 115 F. 2d 492, 117 F. 2d 222, certiorari denied 313 U. S. 567, 61 S. Ct. 941, 85 L. Ed. 1525; *United States v. Mortimer*, 2 Cir., 118 F. 2d 266, certiorari denied 62 S. Ct. 58; *Reed v. Order of United Commercial Travelers*, 2 Cir., 123 F. 2d 252; 40

that the burden of proof is procedural. Whether, in that event, the federal Rule would govern or the New York decisions is a puzzle we are not obliged to solve here. Cf. Cook, *The Federal Courts and The Conflict of Laws*, 36 Ill. L. Rec. (1942) 493.

¹ How "official" this report was under Mass. Gen. Laws 1930, c. 159, §§ 28, 29 (requiring an inspector of the Commission to report on railroad accidents) is not immediately pertinent in my view; it becomes relevant, however, on the view so stressed in the majority opinion of the importance of an assumed motive to misrepresent. That this was a dignified inquiry in the presence of a state official would surely tend to show that the result was no more constructively unreliable than, say, the report of the government's accountant, made for use of the prosecution at the approaching trial, in *United States v. Mortimer*, 2 Cir., 118 F. 2d 266, certiorari denied 62 S. Ct. 58. Criticism of the nature and extent of the defendants' offer of proof herein seems unjustified, in view of the refusal of the district court to consider the matter; counsel cannot be forced to contempt of the district court to show us what we can easily see he was trying to do. *Meaney v. United States*, 2 Cir., 112 F. 2d 538, 130 A. L. R. 973.

Mich. L. Rev. 1105; 11 Brooklyn L. Rev. 78. And it now originates a process of restrictive interpretation of the statute which we have hitherto unanimously repudiated. I certainly agree that judicial legislation should be "cautious" and "interstitial." But I think that rule applies as much to judicial limitation upon, as to judicial expansion of, reforming legislation—that zeal against reform is as much to be guarded against as zeal for reform. It is unwise, if not dangerous, policy to read restrictions into a statute because we personally cannot believe that Congress intended the result which the words themselves require. Others, including the greatest authorities in the field of evidence—e. g., Wigmore, Morgan, and the makers of the A. L. I. Code of Evidence²—cannot believe Congress intended such unexpressed limitations, and neither can I.

We should note that the trial judge refused all offer of proof that the statement "was signed in the regular course of business and that it was the regular course of such business to make such statement." Hence the exclusion was made on the basis that, even if the statement fulfilled the statutory conditions, there was still something in it which prevented its use. And this is so decided, even though the statute itself states that "*any writing, or record, whether in the form of an entry in a book, or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of said act, transaction, occurrence, or event*" if the conditions above referred to are fulfilled. "All other circumstances of the making of such *writing* or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but they *shall not affect its admissibility*. The term 'business' shall include business, profession, occupation, and *calling of every kind*." (Italics mine.) The engineer's statement is direct relevant testimony of the kind which any [fol. 554] court of justice ought to desire to admit, particularly now that the accident of death otherwise seals his mouth. Such a chance happening ought not to control proof

² Wigmore, Evidence, 3d Ed. 1940, § 1530a; A. L. I. Code of Evidence, Final Draft, 1942, 184-5. Morgan was, of course, the major draftsman of this model statute. Morgan and others, The Law of Evidence, 1927, c. 5; *Ulm v. Moore-McCormack Lines*, *supra*.

or limit it substantially to one side only.³ The statement is not of the much more doubtful type excluded by the New York cases, herein relied on, for those cases dealt with entries of other people's statements, or *hearsay so far as the entrant himself was concerned*. Yet those decisions have received Wigmore's severe criticism (Evidence, 3d Ed. 1940, § 1530a), which was cited with approval by us in the *Ulm* case.⁴ The limitation here added to the statute goes beyond anything I know of in any state or federal precedents on this uniform and model statute and clearly must interdict such normal things as reports of accidents or even passenger disputes made regularly by street railway motormen or bus operators and, logically, even the judicially quite familiar log of a ship at sea.

I think we are justified in asking for some more precise formulation of the restriction than is stated in the opinion. If we are now to reverse the uniform trend of this court [fol. 555] up to now in its favorable construction of the statute, those of us who are doubtful of the wisdom of the step are entitled to know what it really is. And if judges, lawyers, and litigants must comport themselves accordingly,

³ Of course death is not a condition under the statute (unlike the common law). The reason for this, it seems to me clear, is the recognition that unless there is some good reason, such as either convenience of proof or non-availability of the witness, the attempt to suppress living testimony for a prearranged memorandum is too obvious to fool modern triers and too foolhardy to be often attempted. In framing a broad statute, therefore, it would be foolish to insert a limitation often unfair, where misuse almost inevitably would incur its proper penalty.

⁴ As Wigmore says, the objection is, by the express provision of the second sentence of the statute, to affect the *weight*, but not the admissibility, of the statement. The rehabilitation of the New York cases here made, contrary to our previous view, and thus promoting not uniformity, but diversity, of construction of a general statute (adopted in several states, Wigmore, *op. cit.* § 1520; 40 Mich. L. Rev. 1126), is against our views as to uniform legislation generally, even in the substantive field. *United States v. Novsam Realty Corp.*, 2 Cir., 125 F. 2d 456; *Madison Personal Loan, Inc. v. Parker*, 2 Cir., 124 F. 2d 143.

they, too, are entitled to a like definition. I find both rationale and restriction vague and nebulous. Apparently the stressed reason is the motive to misrepresent—a reason which went out of favor a century ago when disqualification for interest was abolished, and when judges and juries were granted some sophistication in withstanding exposure to possible perjury and allowed to hear the entire evidence, not merely chosen parts thereof. Is a court then to admit or exclude, depending on its preliminary guess (without the benefit of all the evidence) as to whether the proffered evidence “is” dripping with motivations to misrepresent”? If such a rule is really applied logically, and without fear or favor, then we are, indeed, back in the past of even the common-law rule; of course there is generally some possible motive to misrepresent in all entries of past events which are the subject of present litigation. But if the turning point is the *degree* of possible motivation, then we have a hopelessly unfair subjective test depending upon the initial brusque reactions of the trier.

On the other hand, perhaps the stress on use “in an anticipated lawsuit” is intended both to suggest the inherent vice so feared, as well as to offer a yardstick to determine the extent of its excision. If so—and the argument is not developed—I submit that it, too, is both an illogical and an unfair test. Since the first cave man made notches on a stick, I had supposed that both the purpose and the value of records were their use in future disputes—to prevent many, to settle others. As a matter of fact, this very argument was considered at length and rejected on the authorities by us in *United States v. Mortimer, supra*. So I ask, with [fol. 556] all deference, what really is the restriction on evidence which is now propounded?

The argumentation supporting exclusion here to my mind clearly demonstrates that the statute should be favorably construed. The acute analysis of the trend away from common-law fears of hearsay to the almost complete freedom from such shackles of the proposed Institute Code shows what the trend of the times is.⁵ The point is clinched by the

⁵ Reference might also have been made to the authorities, including the new English Evidence Act, cited in *Boerner v. United States*, 2 Cir., 117 F. 2d 387, 389, certiorari denied 313 U. S. 587, 61 S. Ct. 1120, 85 L. Ed. 1542. The provision

history of this statute and its proposal by a committee of the most distinguished experts of this country (including the revered Judge Hough of this court). Of course the statute grew in part from the business-entries rule of the common law.⁶ But if that is all the experts had in mind—if their reform was to be minor and trivial, not major as they thought—they would surely have left out, at the very least, all the words of the statute I have italicized above. Those words have no place in the statute as here construed. Actually the experts intended, as they show,⁷ to make a [fol. 557] broad general rule which would go beyond all the diversities and vagaries of the common law, or of the partial and various statutes, of the different states and actually settle the matter. I believe they should be held to have accomplished this result.

Certain further suggestions may be noted. First, this is not a statute limited to evidence in jury trials—now had in only a small number of even the usual civil actions⁸—but one applicable to all courts of the United States, bankruptcy, claims, customs and patent appeals, or even administrative courts, if and as constituted. No policy developed

quoted in note 45 of the opinion would not justify exclusion here (*cf.* note 1, *supra*); moreover, it is a carefully defined *legislative* provision, not a vague judicial limitation.

⁶ As well as the shop-book rule and the rule for the use of memoranda to revive memory or as records of past recollection, and numerous attempts at statutory or other revision of these rules. Morgan and others, *The Law of Evidence*, 1927, c. 5; Wigmore, *op. cit.* §§ 1520-1530a; 11 Brooklyn L. Rev. 78.

⁷ See Morgan and Wigmore, cited notes 2 and 6, *supra*. I think these noted experts are highly competent witnesses as to the intent and meaning of the statute they originated and sponsored; and both their affirmative statements and their severe criticism of the New York cases, which are much less restrictive than our present decision (see notes 4, 10, and 11, herein), demonstrate that they never have dreamed that some requirement of a motive to misrepresent could or should be read into the statute.

⁸ In less than five per cent of all civil cases, and in about one-seventh of the contested civil cases before the court. Ann. Rep. Dir. Adm. Off. U. S. Courts, 1941, Table 7, p. 105.

from history of restrictions on jury trials is therefore applicable; the statute makers were clearly following the modern trend that juries, like other triers, can do a better job clear-eyed than with judicial blinders. Second, the suggestion that "regular course of business" are words of art which contain in themselves some such prohibition as "without motive to misrepresent" seems to me more shrewd and labored than frank or even helpful in defining the projected rule. One may add, with deference, that this is a new technique of judicial legislation; it will permit extensive incorporation of almost any ancient rule into new reform legislation merely by saying that certain ordinary and well-known expressions include the common law in themselves. The partial and eclectic nature of the meaning here ascribed to "regular course of business" is shown by a mere statement of this particular common-law rule—as stated above, there were other rules which also led to this reform. Wigmore, *Evidence*, 3d Ed. 1940, §§ 1521, 1528, lists several *different* and *distinct* requirements, death or [fol. 558] absence of the entrant; regular course of business, with an English limitation of a duty owed to a third person; regularity of entry; contemporaneousness; by some courts, *no motive to misrepresent**; a writing. Reference to the statute will show that some of these are carefully continued; others are as carefully omitted. The only reason that the technique here employed does not bring back the requirements, say, of death, or duty owed a third person, is that here those conditions appear fulfilled. In another case, logic would require that they be brought back also.

Moreover, I feel I should add, with reference to this (as it seems to me) wholly forced meaning of "regular course of business," that I can find nothing in the history of the statute or in the cases construing it to justify hanging so much on so little. Certainly our cases look the other way; and *United States v. Mortimer*, *supra*, definitely repudiates it in holding that a document prepared for the purpose of trial is within the statute. In this connection I do not understand the reiterated importance of *Needle v. New York Railways Corp.*, *supra*, for it does not deal with entries by an interested person at all. It merely reiterates the New

* Not even mentioned as a requirement in the discussion prefacing the model act. Morgan and others, *The Law of Evidence*, 1927, c. 5.

York rule, criticized by Wigmore,¹⁰ that entry by a policeman of another's pure hearsay oral statements cannot be received.¹¹ I fear the case has been misunderstood.

Again, some suggestion is made that later proposals for reform may be better than this statute because they perhaps give more discretion to exclude to the trial court. On [fol. 559] the contrary, these proposals, such as the Institute's Code, carry the trend towards free admission further and extend it to hearsay generally. Moreover, the present statutory requirements provide a large area of judicial judgment, as we had particular occasion to point out in the second opinion in the *Ulm* case, 117 F. 2d 222. Had the trial judge here been willing to listen to the examination and cross examination of witnesses as to the regularity of the claimed course of business, and then found that it had not been shown, we could hardly have objected to the exclusion of the evidence. For it is the holding that under no circumstances could this report be received because it must be considered saturated with motives to misrepresent that I find so disturbing. But even if we could think of, or ourselves devise, a better statute, we should nevertheless accept what we have before us, representing as it does a considered judgment, the product of the best modern thinking, that on balance more harm comes from excluding biased evidence, where relevant, than from admitting it. I feel strongly that it is serious business to emasculate a carefully prepared statutory reform.

Finally, the failure to define the extent of the restriction makes the result a portent of future trouble. Stress is laid on the existence of a powerful motive to misrepresent; but what constitutes such a motive is left at large, seemingly to the hasty discretion of the trier, in the midst of a case. I submit that there is hardly a grocer's account book which could not be excluded on that basis. If business houses wish honestly to put themselves in the situation contemplated by the statute, how are they to do so? As it stands, the answer now must be that they cannot. Contrary to the unconditional language of the statute, the result is up

¹⁰ As "again going directly contrary to the express words" of the statute. Wigmore, *op. cit.* §1530a.

¹¹ See *Gerocami v. Fancy F. & P. Corp.*, 249 App. Div. 221, 291 N. Y. S. 837.

to the swift reactions of the moment on the part of the trial judge.

[fol. 560] II. I agree that the other two proffers of evidence were wrongfully refused. And I wish we could persuade the district judges of the wisdom of L. Hand, J.'s admonition in *United States v. White*, 2 Cir., 124 F. 2d 181, 186, that "the disposition to rule out evidence because it offends against some canon of the law of evidence is to be discouraged; admission seldom does any harm, while exclusion often proves extremely embarrassing in sustaining a judgment fundamentally just." The number of verdicts which have been recently put in jeopardy by harsh exclusions seems to me distressing. See *Ulm v. Moore-McCormack Lines*, *supra*; *United States v. White*, *supra*; *Reed v. Order of United Commercial Travelers*, *supra*; *Commercial Banking Corp. v. Martel*, 2 Cir., 123 F. 2d 846; *Jayne v. Mason & Dixon Lines, Inc.*, 2 Cir., 124 F. 2d 317; *United States v. Pignatelli*, 2 Cir., 125 F. 2d 643, 646; *Dellefield v. Blockdel Realty Corp.*, 2 Cir., — F. 2d —. Since I believe reversal should follow the first exclusion here discussed, I do not need to decide the serious question whether or not these errors can be considered harmless. I agree that the charge on burden of proof was not erroneous.

[fol. 561-562] IN UNITED STATES CIRCUIT COURT OF
APPEALS, SECOND CIRCUIT

HOWARD F. HOFFMAN, Individually and as Administrator of
the Goods, Chattels and Credits Which Were of Inez
Hoffman, Also Known as Inez T. Spraker Hoffman,
Deceased, Plaintiff-Appellee,

VS.

HOWARD S. PALMER, HENRY B. SAWYER and JAMES LEE
LOOMIS, as Trustees for The New York, New Haven and
Hartford Railroad Co., Defendants-Appellants

JUDGMENT—July 15, 1942

Appeal from the District Court of the United States for the
Eastern District of New York

This cause came on to be heard on the transcript of record
from the District Court of the United States for the Eastern
District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed with interest and costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

D. E. Roberts, Clerk.

[fol. 563] UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

ORDER AMENDING OPINIONS—July 31, 1942

It is hereby ordered that the majority and dissenting opinions in the above-entitled case, handed down on June 23, 1942, be amended as follows:

At page 1648, at the end of the 17th line, insert the following:

The limited objective at which Congress was in fact driving, is made clear by the Report of the Senate Judiciary Committee reporting out, with recommendations for passage, the bill which became 28 U. S. C. A. §695.^{25a} The Report (with the exceptions of recommendations for a few unimportant verbal changes in the draft of the Model Act) consists entirely of a letter from the Attorney General to the [fol. 564] Chairman of the Committee and a memorandum referred to and enclosed with that letter. As we are bound to infer that the Committee and Congress, in enacting §695, relied on that letter and that memorandum, their contents are significant. The letter reads as follows:

"Modern developments have rendered obsolete the common-law rule governing the admissibility of certain types of documentary evidence. Yet at times the application of the rule has resulted in a miscarriage of justice and has stood in the way of a successful prosecution of meritorious criminal cases. *The old common-law rule requires that every book entry be identified by the person making it.* This is exceedingly difficult, if not impossible, in the case of an institution employing a large bookkeeping staff, particularly when

^{25a} 74th Congress, 2d Session, Senate Report No. 1965, April 24, 1936.

the entries are made by machine. In a recent criminal case the Government was prevented from making out a prima-facie case by a ruling that entries in the books of banks, made in the regular course of business, were not admissible in evidence unless the specific bookkeeper who made the entry could identify it. Since the bank employed 18 bookkeepers, and the entries were made by bookkeeping machines, this was impossible. *The United States Circuit Courts of Appeals for the Second, Fourth, Seventh and Eighth Circuits, and many district courts, as well as a number of the State courts, have recognized the necessity for modifying the rule and have adopted the doctrine that in order to make it admissible in evidence, it is sufficient to show that the entry is contained in a book of regular entries maintained in the establishment, without producing the particular person who made the entry and having him identify it. Owing to the failure of some Federal courts, however, to adopt the modern rule, legislation appears to be necessary to secure uniformity in this matter, and to keep the rules of evidence in line with modern developments. I enclose a draft of bill to accomplish the above-mentioned purpose [fol. 565], and shall be glad if you will introduce it and lend it your support. I also enclose a memorandum, dated January 28, 1936, discussing the questions involved in greater detail."*

That memorandum, printed in full in the Senate Committee's Report, ^{25b} cites and quotes from earlier decisions

^{25a} It reads, in part, as follows:

"Modern business and bookkeeping methods have rendered inadequate and impossible of application the *old common-law rule which required every book entry to be identified by the person making it*. Many large financial institutions, as well as industrial and commercial concerns, use loose-leaf books of accounts in which entries are made by typewriting and tabulating machines. In places in which more than one machine operator are employed, it is generally impossible for any one operator to identify entries made by him, especially after a considerable time has elapsed from the date of the entry.

"The Federal courts generally have recognized the necessity for modifying the rule and have adopted the doctrine that it is sufficient to show that the entry is contained in a

of this and other courts, relaxing "the regular course of business" exception in one respect only, i.e., that where [fol. 566] there is a regular system of making entries, and the system is such as to be "likely to ensure accuracy," there is no necessity of introducing the evidence of the entrants. In each of those cases, the court said that an essential condition of the admission of such hearsay is the "circumstantial guaranty of trustworthiness" consisting of the accuracy ensured by the nature of the regular system of entries.

The memorandum stated, "*While this modification of the common-law rule has been adopted by most of the Federal*

book of regular entries maintained in the establishment, without producing the particular person who made the entry, and having him identify it. The Circuit Courts of Appeals for the Second, Fourth, Seventh and Eighth Circuits have adopted the modern rule. While this modification of the common-law rule has been adopted by most of the Federal courts, as well as by many of the States, nevertheless there are some courts that do not follow it, and for that reason legislation on the subject appears highly desirable.

"The Government in a number of instances has been handicapped in the prosecution of criminal cases where the court declined to recognize the modified rule. For example, in a recent criminal case tried in the United States District Court for the Middle District of Pennsylvania, *United States v. D. M. Johnson*, the Government was prevented from making out a prima-facie case by a ruling that entries in books of a bank made in the regular course of business were not admissible in evidence, unless the specific bookkeeper who made an entry could identify it. This was impossible in view of the fact that the bank employed 18 bookkeepers, and since the entries were made by bookkeeping machines, no one bookkeeper could recall which entries were made by him * * *. In *United States v. Cotter* (C. C. A. 2d Circuit, 60 Fed. (2d) 689-693) the Government for the purpose of tracing to the defendant and another the proceeds of certain shares of stock sold, offered in evidence their deposit slips and the sheets in the bank ledgers recording their accounts, to which the defendant unsuccessfully objected on the grounds that they were incompetent and immaterial. The Circuit Court of Appeals in the Second Circuit, in holding that the evidence offered was admissible, said: "The law

courts, as well as by many of the States, nevertheless there [fol. 567] are some courts which do not follow it, and for that reason legislation on the subject appears highly desirable * * * A draft of bill is submitted herewith designed to make uniform in the Federal courts the modern rule now followed generally by the Federal courts and many State courts to which reference has been made."

It is apparent that the intention of the Attorney General—and, therefore, of the Senate Committee and of Congress which adopted his explanation as theirs—was to bring the decisions of all the Federal courts into line with the "modern" pre-statutory decisions of this court

has much changed as to such documents; it is no longer always necessary to produce the original entrants, and make a complete chain of direct proof. We discussed the question last in *Massachusetts Bonding Co. v. Norwich Pharmacal Co.* (18 F. (2d) 934), where we said that the extent to which the entrants must be produced depended upon their accessibility, and how far their testimony would substantially verify the document. In the case of a bank, the accuracy of whose records is essential to the very life of its business, and where, because of the multitude of transactions, the entrants can do no more than describe the system and say that they followed it, it is not necessary to go further than prove that the ledgers were kept by a system likely to insure accuracy, and that they appear to be regular on their face; the other side must discredit them. So far as this be an extension of what we said in *Mass. Bonding Co. v. Norwich Pharmacal Co.*, we take the step; for the probable correctness of ordinary bankbooks far outweighs any protection to the other side, afforded by emptying the bank of much of its clerical force. Unless the system under which they are kept is defective, the danger of mistake is slight and in any event the putative corroboration by the entrants is inappreciable * * * In *Mass. Bonding & Ins. Co. v. Norwich Pharmacal Co.* (C. G. A. 2d Circuit, 18 F. (2d) 934) objection was made to the admission in evidence of a stamp account kept by clerks of the defendant and certain tabulations made therefrom which were also admitted. Respecting the admission of these records, the Circuit Court of Appeals for the Second Circuit, speaking through Judge Learned Hand, said: 'The situation is the familiar one of voluminous records, made at the time in the daily routine

and the Circuit Courts of Appeals for the Fourth, Seventh and Eighth Circuits. There is no slight indication of any intention of going far beyond the purpose of the legislation as explained by the Attorney General and to remove the essentials of the "guarantee of trustworthiness" which had been recognized by this and other courts when in their decisions they had enunciated the "modern rule."^{25c} Had such been the intention, surely the Senate Committee Report would have at least so intimated and not preserved utter silence concerning it.

At page 1673, at the end of footnote 6, insert the following (as part of the original paragraph):—

of a large mercantile business, by entrants not produced. *The question is in what cases it is necessary to supplement proof of the way in which the business is carried on and the entries are made, by the testimony of the entrants themselves . . .* The routine of modern affairs, mercantile, financial and industrial, is conducted with so extreme a division of labor that the transactions cannot be proved at first hand without the concurrence of persons, each of whom can contribute no more than a slight part, and that part not dependent on this memory, of the event. Records, and records alone, are their adequate repository, and are in practice accepted as accurate upon the faith of the routine itself, and of the self-consistency of their contents.'

"To the same effect are *Cub Fork Coal Co. v. Fairmont Glass Co.* (C. C. A. 7th Circuit, 19 F. (2d) 273); *St. Paul Fire and Marine Insurance Co. v. American Food Products Co.* (C. C. A. 8th Circuit, 21 Fed. (2d) 733-737); *Capone v. United States* (C. C. A. 7th Circuit, 51 F. (2d) 609); *United States v. Becker* (C. C. A. 2d Circuit, 62 F. (2d) 1007) . . .

"A draft of a bill is submitted herewith designed to make uniform in the Federal courts the modern rule now followed generally by the Federal courts and many State courts, to which reference has been made."

Emphasis in this memo and the Attorney General's letter has been added.

^{25c} The language of the Act indicated an intention somewhat to enlarge the "modern rule," in the ways previously noted in this opinion, and in our earlier opinions construing it, which are discussed *infra*.

And Attorney General Cummings, in recommending the legislation to Congress, merely rehearsed this background without in any way suggesting the completely stultifying addition here made to the statute.

Dated, New York, N. Y., July 31, 1942.

Thomas W. Swan, Circuit Judge. Charles E. Clark,
Circuit Judge. Jerome N. Frank, Circuit Judge.

[fol. 569] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 570] SUPREME COURT OF THE UNITED STATES, OCTOBER
TERM, 1942

No. 300

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed October 12, 1942

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: Enter Edward R. Brumley. File No: 46801. U. S. Circuit Court of Appeals, Second Circuit. Term No. 300. Howard S. Palmer, Henry B. Sawyer and James Lee Loomis, as Trustees for the New York, New Haven and Hartford Railroad Company, Petitioners, vs. Howard F. Hoffman, Individually and as Administrator of the Goods, Chattels and Credits which were of Inez Hoffman, also Known as Inez T. Spraker Hoffman, Deceased. Petition for writ of certiorari and exhibit thereto. Filed August 13, 1942. Term No. 300 O. T. 1942.

Office - Supreme Court, U. S.
FILED

AUG 13 1942

CHARLES ELMORE CROLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 300

HOWARD S. PALMER, HENRY B. SAWYER and
JAMES LEE LOOMIS, as Trustees for The New
York, New-Haven and Hartford Railroad Company,
Petitioners,

—against—

HOWARD F. HOFFMAN, individually and as Adminis-
trator of the goods, chattels and credits which were of
Inez Hoffman, also known as Inez T. Spraker Hoff-
man, deceased,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR
THE SECOND CIRCUIT.

EDWARD R. BRUMLEY,
Counsel for Petitioners.

R. J. SEIFERT,
A. G. KUHACH,
Of Counsel.

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Supreme Court of the United States

OCTOBER TERM, 1942.

No.

**HOWARD S. PALMER, HENRY B. SAWYER and JAMES LEE
LOOMIS, as Trustees for The New York, New Haven
and Hartford Railroad Company,**

Petitioners,

—against—

**HOWARD F. HOFFMAN, individually and as Administrator
of the goods, chattels and credits which were of Inez
Hoffman, also known as Inez T. Spraker Hoffman,
deceased,**

Respondent.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

The petitioners, Howard S. Palmer, Henry B. Sawyer and James Lee Loomis, as Trustees for The New York, New Haven and Hartford Railroad Company, pray that a writ of certiorari issue to review the decree of the Circuit Court of Appeals for the Second Circuit entered in the above cause on July 15, 1942, affirming a judgment of the District Court of the United States for the Eastern District of New York, and respectfully represent:

THE OPINIONS OF THE COURT BELOW.

There was no opinion of the trial court. The majority and dissenting opinions in the Circuit Court of Appeals for the Second Circuit have not yet been reported but appear at pages 513 to 561 of the Record. The amended majority and dissenting opinions appear at pages 565 to 570 of the Record.

JURISDICTION.

1. The jurisdiction of this Court is invoked under §240, subdivision (a), of the Judicial Code, as amended by the Acts of February 13, 1925, c. 229, §1, 43 Stat. 938; of January 31, 1928, c. 14, §1, 45 Stat. 54; and of June 7, 1934, c. 426, 48 Stat. 926, 28 U. S. C. A. §347. (a).

2. The decree of the Circuit Court of Appeals, entitled Order for Mandate, sought to be reviewed, is dated July 15, 1942 (R. 562, 563). This decree affirms the judgment of the District Court.

STATUTES INVOLVED.

The statutes involved are set forth in the Appendix, *infra*, pages 19 to 22, inclusive.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

The complaint alleges that on December 25, 1940, at about 6:15 p. m., while the plaintiff (respondent) Howard F. Hoffman was driving a Ford coupe at a grade-crossing in West Stockbridge, Massachusetts, the automobile was struck by a locomotive engine operated by the defendants (petitioners), causing injuries to the plaintiff and the death of his wife, Inez F. Hoffman (R. 5, 6, 13). The jurisdiction of the United States District Court for the Eastern District of New York was based on diversity of citizenship (R. 4, 5, 40).

The First Cause of Action, on behalf of Howard F. Hoffman, brought under a statute of Massachusetts, alleges defendants were negligent in failing to ring a bell or blow a whistle on the engine (R. 7, 8). It also sets out that plaintiff reduced speed, thereafter did stop,

look and listen, and did then proceed cautiously over the crossing, in compliance with another statute of Massachusetts (R. 9).

The Second Cause of Action, also on behalf of Howard F. Hoffman, is based on the common law, and alleges defendants were negligent in failing to ring a bell or blow a whistle, in failing to have a headlight on the rear end of the locomotive, in operating the locomotive with its headlight away from the crossing, and in certain other respects immaterial to this petition (R. 9-12).

The Third and Fourth Causes of Action, brought by Howard F. Hoffman as administrator of the estate of Inez Hoffman, allege negligence of defendants as to bell and whistle, and negligence under a statute of Massachusetts (R. 12-15). The Fifth and Sixth Causes of Action were discontinued (R. 39).

On the issue of negligence the trial court submitted three questions to the jury—failure to ring a bell, failure to blow a whistle, and failure to have a light burning on the front of the train (R. 421, 423, 426, 427).

Judgment was entered in favor of the plaintiff, Howard F. Hoffman, individually, in the amount of \$25,077.33, and in favor of Howard F. Hoffman, as Administrator of the Estate of Inez Hoffman, in the amount of \$9,000.00 on November 25, 1941 (R. 500, 501).

In the District Court, a statement of defendants' engineer, who had died prior to the trial (R. 271), was offered in evidence under 28 U. S. C. A. §695. (Defendants' Exhibit J for Identification, R. 496-499.) The plaintiff objected, the court sustained the objection and defendants excepted (R. 420, 421). The Circuit Court of Appeals held that even though the defendants offered proof that the statement was made in the regular course of business and that it was the regular course of such business to make the statement, the statement was inadmissible (R. 535, 536).

Plaintiff's witness Lawrence Bona, testified that he gave a statement to Mr. Diamond (R. 100, 101). The trial court ruled that if the attorney for the defendants called for it and looked at it, it would open the door for the plaintiff to offer the statement in evidence, and if that were done the court would receive it (R. 125, 233). The Circuit Court of Appeals held unanimously that this constituted error, but the majority opinion says it was not reversible error because (1) as the statement was not in the record it was impossible to say whether it would have served for impeaching purposes, and whether it would have led to such an impeachment of the witness as materially to affect the jury's verdict; and because (2) it cannot be said that the trial judge was unreasonable in relying upon *Edison Electric Light Co. v. United States Electric Lighting Co.*, 45 Fed. 55 (R. 550, 560, 561). Plaintiff's attorney produced the statement, but made no objection to its inspection and no claim that it was irrelevant or a confidential communication (R. 125). Other witnesses called by the plaintiff had given signed statements to the attorney for plaintiff (R. 173, 209, 232). Because of the ruling, these were not called for.

In its charge, the trial court said that the defendants had the burden of proving contributory negligence (R. 428). This was contrary to defendants' request No. 16 that in the personal injury action the plaintiff had the burden of proving freedom from contributory negligence (R. 448). Defendants excepted to the charge, and to the failure to charge defendants' request No. 16, as to burden of proof (R. 437). The Circuit Court of Appeals affirmed the action of the District Court (R. 552).

THE QUESTIONS PRESENTED.

(1) Whether the Circuit Court of Appeals improperly read into the Act of June 20, 1936, c. 640, §1, 49 Stat. 1561; 28 U. S. C. A. §493, a restriction which supported the trial court's exclusion of a stenographic report of the engineer's examination, offered by the defendants, even though the statement was signed in the regular course of business and it was the regular course of business to make such statement.

(2) Whether the Circuit Court of Appeals improperly refused to treat as reversible error the denial of defendants' admitted right to demand and inspect, without any condition attached, a statement made by plaintiff's witness, unless it appeared that the statement could be used for purposes of such successful impeachment as materially to affect the jury's verdict.

(3) Whether in diversity of citizenship cases the federal courts must follow conflict of laws rules as to burden of proof of contributory negligence prevailing in the states in which they sit, notwithstanding Federal Rule of Civil Procedure 8 (c).

SPECIFICATION OF ERRORS.

The Circuit Court of Appeals erred:

1. In holding that the statement of defendants' engineer was not admissible in evidence under 28 U. S. C. A. §493.

2. In holding that the admittedly erroneous ruling of the District Court, that upon demand for and inspection by defendants' attorney of a statement made by plain-

tiff's witness, the statement was admissible in evidence, was not reversible error.

3. In holding that the burden of proving contributory negligence was on the defendant.

4. In affirming the judgment of the District Court.

REASONS RELIED ON FOR THE GRANTING OF THE WRIT.

The petitioners contend that the writ of certiorari should be granted for the following reasons:

1. *The decision of the Circuit Court of Appeals as to the application and interpretation of 28 U. S. C. A. §695 raises an important question of federal law which has not been, but should be, determined by this Court.*

The Circuit Court of Appeals has decided that the engineer's statement (Defendants' Exhibit J for Identification, R. 496-499) was not admissible under 28 U. S. C. A. §695. This statute reads as follows:

"**ADMISSIBILITY.** In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of said act, transaction, occurrence, or event, if it shall appear that it was made in the regular course of any business, and that it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter. All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but they shall not

affect its admissibility. The term 'business' shall include business, profession, occupation, and calling of every kind."

Defendants offered to prove that the statement was made in the regular course of business and that it was the regular course of business to make such statement (R. 420, 421). The plaintiff's attorney objected to the statement without giving any grounds, and the trial court sustained the objection to the introduction of the statement without giving any reasons (R. 420, 421). In the opinion of Circuit Judge Frank the statement was inadmissible, even though the proof fulfilled the statutory conditions (see dissenting opinion of Circuit Judge Clark, R. 554). Circuit Judge Frank seems to think that proof of "regular course of business" would have shown "a regular practice of making records with the purpose of supplying evidence in a highly probable law suit" (R. 522), "an obviously motivated record" (R. 539), and that "the primary purpose of the employer, obvious from the circumstances, in ordering those reports is to use them in litigation involving those accidents" (R. 541). He concludes: "But the engineer's statement is in the record, and we know, from the evidence, that the engineer was a party to the accident. No proof, then, was possible that he did not have the peculiarly strong motive to misrepresent of the kind which, we hold, precludes its admission" (R. 543). This reads into the statute a restriction not expressed, and reads out of the statute the clause: "all other circumstances of the making of such writing or record * * * may be shown to affect its weight, but they shall not affect its admissibility."

The majority opinion argues that the words "regular course of business" in the statute should be given the settled meaning which it is claimed they had at common

law (R. 523, 525), and that the principle of circumstantial guarantee of trustworthiness is inherent in all exceptions to the hearsay rule (R. 519). The dissenting opinion argues that the restriction read into the statute is directly opposed to its intent, its history and background, and to the views of Wigmore and Morgan (R. 553, 554). The dissenting opinion also argues that the restriction is not precise, is against the trend of the times, and shows a new technique of judicial legislation (R. 553, 556, 557).

The scope of the decision is obviously very broad. To quote Circuit Judge Clark:

"The limitation here added to the statute goes beyond anything I know of in any state or federal precedents on this uniform and model statute and clearly must interdict such normal things as reports of accidents or even passenger disputes made regularly by street railway motormen or bus operators and, logically, even the judicially quite familiar log of a ship at sea (R. 555). . . . this is not a statute limited to evidence in jury trials . . . but one applicable to all courts of the United States, bankruptcy, claims, customs and patent appeals, or even administrative courts (R. 558) . . . I submit that there is hardly a grocer's account book which could not be excluded on that basis" (R. 560).

Not only does the decision apply to many situations, bound to recur frequently, but "the failure to define the extent of the restriction makes the result a portent of future trouble" (dissenting opinion of Circuit Judge Clark, R. 560).

According to Circuit Judge Frank, to make a statement admissible under the statute, there must be no more than a minimal motive to misrepresent (R. 515), and a statement is not admissible if made by a party to the acci-

dent (R. 543). No statement made by an employee, under standing orders from his employer to make reports of accidents in which the employee is a participant, is admissible, for Circuit Judge Frank thinks it is obvious that the primary purpose of the employer is to use such statement in litigation (R. 541).

Circuit Judge Clark makes this criticism:

"I think we are justified in asking for some more precise formulation of the restriction than is stated in the opinion * * *. I find both rationale and restriction vague and nebulous" (R. 555, 556).

We urge that the decision is contrary to the express provisions of the statute, that the scope of the decision is very broad, that it lacks preciseness of application in the administration of the statute, and that the problem will recur frequently in many courts. We have here a question of federal law more important even than that which served as a basis for the granting of the writ in *Sibbach v. Wilson & Co.*, 312 U. S. 1 (1941), involving Federal Rules of Civil Procedure 35 and 37.

2. *The decision of the Circuit Court of Appeals on a federal question, as to the application and interpretation of 28 U. S. C. A. §695, is in conflict with the decisions of this Court insofar as they have a bearing upon the question here presented and is erroneous.*

The opinion of Circuit Judge Frank construes the statute to mean that even if the engineer's statement fulfilled the statutory conditions, it was not admissible because it was "dripping with motivations to misrepresent" (R. 535, 536). He says that "the statute does not permit the introduction in evidence of a hearsay statement in the form of a written memorandum or report concerning an accident, if the statement was prepared after the accident has occurred, where the person who makes the

memorandum or report knows at the time of making it that he is very likely, in a probable law suit relating to that accident, to be charged with wrongdoing as a participant in the accident, so that he is almost certain, when making the memorandum or report, to be sharply affected by a desire to exculpate himself and to relieve himself or his employer of liability" (R. 536). Thus the opinion reads into the act a restriction which is "directly opposed to the intent of the statute, as shown by its plain terms" (Circuit Judge Clark's dissenting opinion, R. 553).

The appeal was argued May 7, 1942, the original opinions were handed down on June 23, 1942 (R. 513), and an order was issued on July 31, 1942, amending the majority and dissenting opinions (R. 565-570). Circuit Judge Frank has added quotations from a letter of the Attorney General to the Chairman of the Senate Judiciary Committee, and a memorandum enclosed with the letter, for the purpose of showing the limited objective at which Congress was driving (R. 565). Circuit Judge Clark makes a quite different interpretation and characterizes the majority position as a "completely stultifying addition here made to the statute" (R. 570). This is not the place to go into detail as to the merits of this controversy. Both the original and amended opinions, majority and dissenting, show diametrically opposed interpretations of a federal statute.

The Circuit Court of Appeals, by inserting restrictions into §695, particularly "regular course of business", even though the words of the statute are clear and unambiguous, has rendered a decision in conflict with decisions of this Court which adhere to a well-recognized and fundamental rule of statutory construction. Chief Justice Marshall, in *United States v. Wiltberger*, 5 Wheat. 76 (1820), said (pp. 95, 96):

"Where there is no ambiguity in the words, there is no room for construction."

The rule was again stated in *United States v. Hartwell*, 6 Wall. 385, 396 (1867):

"If the language be clear it is conclusive. There can be no construction where there is nothing to construe. The words must not be narrowed to the exclusion of what the legislature intended to embrace; but that intention must be gathered from the words, and they must be such as to leave no room for a reasonable doubt upon the subject. It must not be defeated by a forced and over-strict construction."

A few of the many other decisions of this Court which hold that language construction does not come into play without ambiguity of language are: *Lewis v. United States*, 92 U. S. 618, 621 (1875); *Lake County v. Rollins*, 130 U. S. 662, 670 (1889); *Hamilton v. Rathbone*, 175 U. S. 414, 419-421 (1899); *Thompson v. United States*, 246 U. S. 547, 551 (1918); *Russell Co. v. United States*, 261 U. S. 514, 519 (1923); *Osaka Shosen Line v. United States*, 300 U. S. 98, 101 (1937).

3. *The decision of the Circuit Court of Appeals, that it was harmless error for the trial court to hold that, upon demand for and inspection by defendants' attorney of a statement made by plaintiff's witness, it was admissible in evidence, presents important questions of Federal law which have not been, but should be, determined by this Court.*

The trial court ruled that if defendants' attorney called for and inspected a statement made by plaintiff's witness Lawrence Bona it would be admissible in evidence for the plaintiff (R. 253). The Circuit Court of Appeals held unanimously that this was error, but the majority opinion says it was not reversible error because (1) as the statement was not in the record it was impossible to know whether it would have served for impeaching purposes,

and whether such impeachment would have materially affected the jury's verdict; and because (2) it could not be said that the trial judge was unreasonable in relying upon *Edison Electric Light Co. v. United States Electric Lighting Co.*, 45 Fed. 55 (C. C., S. D. N. Y., 1891) *supra*, (R. 550, 560, 561). The failure of the Circuit Court of Appeals to set aside the verdict below imposes on the right to demand and inspect documents conditions (viz., that the documents be before the court so that it can determine whether they will serve as a basis for impeachment and whether such impeachment will materially affect the jury's verdict) which are contrary to the intent of the Federal Rules of Civil Procedure.

The majority opinion says that the trial judge should have dealt with the defendants' attorney's request as if it had arisen under Federal Rule of Civil Procedure 26 (b) (R. 550). This Rule is set out in Appendix, *infra*, page 20. Aside from the matter of privilege, the only restriction imposed by Rule 26 (b) is that the matter be relevant to the subject matter. The Rule provides no basis for requiring that the instrument sought to be inspected be before the court so that it can determine whether the instrument will serve as a basis for impeachment and whether such impeachment will materially affect the jury's verdict. For the Circuit Court of Appeals to hold that demand and inspection by defendants' attorney would not make the statement admissible for the plaintiff, but then refuse to set aside the verdict because the statement failed to satisfy an additional requirement imposed by the Court, is a denial of a right given by Rule 26 (b). Furthermore, that Rule relates primarily to the examination of witnesses. At the time of the ruling by the trial court the attorney for defendants was demanding, and asking for the right of inspection of, a document, and was not examining a witness on that document.

The conditions imposed by the Circuit Court of Appeals are contrary to the intent and spirit and purpose of other

Federal Rules of Civil Procedure, particularly Rules 34 and 45 (b) (set out in Appendix, *infra*, pp. 20-21). Under Rule 34, the court, upon motion and notice, may order any party to produce and permit the inspection of any designated documents, papers, books, accounts and letters, not privileged, which constitute or contain evidence material to any matter involved in the action and which are in his possession, custody or control. Rule 45 (b) provides that a subpoena may also command the person to whom it is directed to produce the books, papers or documents designated therein. The court, upon motion, may quash the subpoena if it is unreasonable and oppressive, or condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, or documents. Like Rule 26 (b), these Rules also contain restrictions designed to prevent unreasonable and oppressive inquiry. None of these restrictions, however, supplies a basis for the conditions imposed.

In not treating this admitted error as a ground for reversal the Circuit Court of Appeals failed to give consideration to another aspect of the question—whether the situation was covered by the Federal Rules or by the Conformity Act (R. S. §914, 28 U. S. C. A. §724; set out in Appendix, *infra*, p. 21). The Conformity Act would require the adoption of the New York rule as to inspection of documents. *Smith v. Rentz*, 131 N. Y. 169 (1892) allows unqualified right of inspection, free from any such conditions as have been imposed either by the trial court or by the Circuit Court of Appeals. While this Court in *Sibbach v. Wilson & Co.*, 312 U. S. 1, *supra*, a case concerning the validity of Rule 35 of the Federal Rules of Civil Procedure, said that the Rules repealed the Conformity Act (see page 10, opinion of Mr. Justice Roberts), the question still persists whether that Act has been entirely super-

seded, or whether a remnant remains when not in conflict with the Rules. See "The Admissibility of Evidence under the Federal Rules" by Thomas F. Green, Jr., 55 Harvard Law Review 197, 204 (1941).

These questions are important. They involve the scope of the Federal Rules of Civil Procedure, particularly 26 (b), 34, and 45 (b). It is important to know whether the new Rules cover the entire field of civil procedure, or whether the Conformity Act is still applicable to certain situations. It is clear that these questions will arise in many trials of civil cases in the federal courts and will result in confusion of treatment unless this Court makes a definite ruling on the issues presented.

4. *The decision of the Circuit Court of Appeals for the Second Circuit, that the burden of proving contributory negligence was on the defendants, is in conflict with the decisions of the Circuit Courts of Appeals for the First and Eighth Circuits.*

The decision of the Circuit Court of Appeals is to the effect that because of Rule 8 (c) (set out in Appendix, *infra*, pp. 19-20), or because of the decisions of the New York courts, including those relating to conflict of laws, the trial court was correct in charging that the burden of proving contributory negligence was on the defendants (R: 552).

Defendants urge that Rule 8 (c) has no application as it relates to pleading and not to proof, and as federal courts treat burden of proof as a matter of substance which cannot be altered by court rule; that New York courts, on the other hand, treat burden of proof as a matter of procedure; that under New York decisions as to conflict of laws, New York would apply its own law, and not that of Massachusetts; that under New York law the burden of proving freedom from contributory negligence, in a personal injury action, is on the plaintiff.

The escape method of treatment in the majority opinion (admitted in note 65, R. 552) is not sound. This case involves consideration both of Rule 8 (c) and of New York law. To reach what we contend was a wrong result, the opinion refuses to pass upon Rule 8 (c) and misinterprets the New York law.

In not holding that Rule 8 (c) refers only to pleading the decision is in conflict with *Sampson v. Channell*, 110 F. (2d) 754 (C. C. A. 1, 1940), certiorari denied 310 U. S. 650, and with *Fort Dodge Hotel Co. v. Bartelt*, 119 F. (2d) 253 (C. C. A. 8, 1941). While Circuit Judge Magruder, in *Sampson v. Channell*, *supra*, might have reached the same result in the particular case by reliance upon Rule 8 (c), his opinion says that the Rule contains no prescription as to burden of proof and the court must look elsewhere for the answer (110 F. (2d) 754 at page 757). In *Fort Dodge Hotel Co. v. Bartelt*, *supra*, the cause of action for injuries arose in Iowa and the case was tried in the federal court in that state. Under the law of Iowa proof of freedom from contributory negligence was an essential element of the cause of action and the court refused to apply Rule 8 (c).

In not definitely holding that the trial court should have been governed by the conflict of laws rule of New York, which treats burden of proof as procedural, the decision is again in conflict with *Sampson v. Channell*, *supra*. In that case the action was brought in a federal court for Massachusetts for injuries sustained in Maine. Circuit Judge Magruder says that Massachusetts treats burden of proof as a matter of procedure only but, as we have pointed out, he refused to rely on Rule 8 (c) and looked to the conflict of laws rule of Massachusetts.

We submit that the opinion of Circuit Judge Frank in the present case misinterprets *Fitzpatrick v. Interna-*

tional Ry. Co., 252 N. Y. 127 (1929). In that case the Court of Appeals dealt with the application of a foreign-created right and did not concern itself with a question of remedy. Plaintiff's right to recover was based solely on the Ontario Contributory Negligence Act (set out in Appendix, *infra*, p. 22). By New York law, there is no recovery for a plaintiff in a personal injury action who is guilty of contributory negligence. The distinction is recognized by Circuit Judge Magruder in *Sampson v. Channell*, *supra* (note 2, p. 755). In *Wright v. Palmison*, 237 App. Div. 22 (2nd Dept., 1932), a personal injury case arose out of an accident in Massachusetts and the per curiam opinion applies the New York rule as to proof of freedom from contributory negligence. See also *Clark v. Harnischfeger*, 238 App. Div. 493 (2nd Dept., 1933), a personal injury action arising out of an accident in Pennsylvania, where the court said (p. 495):

"At any rate, the question of burden of proof of freedom from contributory negligence is a rule of evidence and provable according to the law applicable in the State of New York. (*Sackheim v. Piqueron*, 215 N. Y. 62; *Wright v. Palmison*, 237 App. Div. 22)."

5. *The decision of the Circuit Court of Appeals that the burden of proving contributory negligence was on the defendants presents important questions of federal law which have not been, but should be, determined by this Court.*

Circuit Judge Frank thought it was matter of indifference whether Rule 8 (c) or the New York conflict of laws rule applied (R. 552). The opinion of the Circuit Court of Appeals in *Griffin v. McCoach*, 116 F. (2d) 261, 264 (C. C. A. 5) said that it was immaterial, insofar as the decision of the case was concerned, whether the law of Texas or the law of New York was applied. This Court thought otherwise. 313 U. S. 498 (1941).

We have stated the main question to be, whether in diversity of citizenship cases the federal courts must follow the conflict of laws rules as to burden of proof of contributory negligence prevailing in the states in which they sit, notwithstanding Federal Rule of Civil Procedure 8 (c). There are several subsidiary questions involved. Is Federal Rule 8 (c) a rule of procedure or substance? Is it limited to pleading only? If a rule of substance, is it within the authority granted by Congress? If it is a rule of substance and within the authority granted by Congress, is it independent of *Erie R. Co. v. Tompkins*, 304 U. S. 64 (1938)? Is the matter of burden of proof of contributory negligence a matter of substantive law within the Rules of Decision Act (R. S. §721; 28 U. S. C. A. §725; set out in Appendix, *infra*, p. 22)? Does the problem here presented fall within the substantive sphere of the *Tompkins* case, or within the procedural sphere of the Federal Rules? In a diversity of citizenship case, is the federal court to follow the state conflict of laws rules where the state treats the matter of burden of proof of contributory negligence as procedural? These are important, everpresent questions. As Circuit Judge Magruder says in *Sampson v. Channell*, *supra*, "Until the point is finally ruled upon by the Supreme Court, lower courts must piece out as best they can the implications of the *Tompkins* case" (pp. 760, 761). The exact difficulty here presented was recognized as unsolved by Circuit Judge Goodrich in *Boyle v. Ward*, 125 F. (2d) 672 (C. C. A. 3, 1942; note 8, at p. 675). "With respect to the burden of proof a sharp conflict between *Erie Railroad v. Tompkins* and the Federal Rules has developed." 38 Columbia Law Review 1472, 1478 (1938).

This Court has not decided these questions. In *Erie R. Co. v. Tompkins*, 304 U. S. 64, *supra*, it was held that in diversity actions at law, the federal court must apply

the substantive law of the state, where the matter involves general common law. In *Cities Service Co. v. Dunlap*, 308 U. S. 308 (1939), this Court merely determined that burden of proof as to legal title in an equity suit related to a substantial right, and applied the local rule. In *Sibbach v. Wilson & Co.*, 312 U. S. 1, *supra*, this Court concluded that the Enabling Act of June 19, 1934 (c. 651, 48 Stat. 1064; 28 U. S. C. A. §723 b, c; set out in Appendix, *infra*, p. 19) was restricted to matters of pleading and court practice and procedure (p. 10), that Rules 35 and 37 regulate procedure (p. 14), and that the word "substantive" in the Act is not the equivalent of "important" or "substantial" (p. 11). In *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U. S. 487 (1941), the principle of the *Tompkins* case was applied to include the forum's conflict of laws rules. *Griffin v. McCoach*, 313 U. S. 498, *supra*, applied the *Klaxon* principle to a new set of facts. *D'Oench, Duhme & Co. v. Federal Deposit Ins. Corp.*, 315 U. S. —, 86 L. ed. Advance Opinion 642, decided March 2, 1942, involved a federal, not a state question; and the *Klaxon* case was not applicable.

In the last analysis, considerations of policy are involved which should be passed upon by this Court. There is clear public importance in the administration of the Federal Rules of Civil Procedure, including Rule 8 (c).

WHEREFORE, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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Counsel for Petitioners.

R. J. SEIFFERT,
A. G. KURBACH,
Of Counsel.

Appendix.

STATUTES INVOLVED.

Enabling Act of June 19, 1934, c. 651, §§1, 2; 48 Stat. 1064; 28 U. S. C. A. §723 b, c, reads as follows:

"Be it enacted * * * That the Supreme Court of the United States shall have the power to prescribe, by general rules, for the district courts of the United States and for the courts of the District of Columbia, the form of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law. Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant. They shall take effect six months after their promulgation, and thereafter all laws in conflict therewith shall be of no further force or effect.

"Sec. 2. The court may at any time unite the general rules prescribed by it for cases in equity with those in actions at law so as to secure one form of civil action and procedure for both: *Provided, however,* That in such union of rules the right of trial by jury as at common law and declared by the seventh amendment to the Constitution shall be preserved to the parties inviolate. Such united rules shall not take effect until they shall have been reported to Congress by the Attorney General at the beginning of a regular session thereof and until after the close of such session."

Rule 8 (c) of the Federal Rules of Civil Procedure, 28 U. S. C. A. following §723 (c), reads as follows:

"AFFIRMATIVE DEFENSES. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge

in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation."

Rule 26 (b) of the Federal Rules of Civil Procedure, 28 U. S. C. A. following §723 (c), reads as follows:

"SCOPE OF EXAMINATION. Unless otherwise ordered by the court as provided by Rule 30 (b) or (d), the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether relating to the claim or defense of the examining party or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge or relevant facts."

Rule 34 of the Federal Rules of Civil Procedure, 28 U. S. C. A., following §723 (c), reads as follows:

"Upon motion of any party showing good cause therefor and upon notice to all other parties, the court in which an action is pending may (1) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, not privileged, which constitute or contain evidence material to any matter involved in the action and which are in his possession, custody, or

control; or (2) order any party to permit entry upon designated land or other property in his possession or control for the purpose of inspecting, measuring, surveying, or photographing the property or any designated relevant object or operation thereon. The order shall specify the time, place, and manner of making the inspection and taking the copies and photographs and may prescribe such terms and conditions as are just."

Rule 45 (b) of the Federal Rules of Civil Procedure, 28 U. S. C. A., following §723 (c), reads as follows:

"FOR PRODUCTION OF DOCUMENTARY EVIDENCE. A subpoena may also command the person to whom it is directed to produce the books, papers, or documents designated therein; but the court, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may (1) quash the subpoena if it is unreasonable and oppressive, or (2) condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, or documents."

Conformity Act, R. S. §914; 28 U. S. C. A. §724, reads as follows:

"CONFORMITY TO PRACTICE IN STATE COURTS. The practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the district courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such district courts are held, any rule of court to the contrary notwithstanding."

Rules of Decision Act, R. S. §721; 28 U. S. C. A. §725, reads as follows:

"LAWS OF STATES AS RULES OF DECISION. The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

Ontario Contributory Negligence Act, Chapter 32 of the Laws of Ontario, 1924, reads as follows: .

"3. In any action or counterclaim for damages hereafter brought, which is founded upon fault or negligence, if a plea of contributory fault or negligence shall be found to have been established, the jury, or the judge in an action tried without a jury, shall find:

"First: The entire amount of damages to which the plaintiff would have been entitled had there been no such contributory fault or neglect;

"Secondly: The degree in which each party was in fault and the manner in which the amount of damages found should be apportioned so that the plaintiff shall have judgment only for so much thereof as is proportionate to the degree of fault imputable to the defendant.

"4. Where the judge or jury finds that it is not, upon the evidence, practicable to determine the respective degrees of fault the defendant shall be liable for one-half the damages sustained."



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DEC 24 1942

CHARLES ELMORE BRUMLEY

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 300.

**HOWARD S. PALMER, HENRY B. SAWYER and
JAMES LEE LOOMIS, as Trustees for The New
York, New Haven and Hartford Railroad Company,**
Petitioners,

—against—

**HOWARD F. HOFFMAN, individually and as Adminis-
trator of the goods, chattels and credits which were of
Inez Hoffman, also known as Inez T. Spraker Hoff-
man, deceased,**

Respondent.

BRIEF ON BEHALF OF PETITIONERS.

✓ **EDWARD R. BRUMLEY,**
Counsel for Petitioners.

**R. J. SEIFERT,
A. G. KUHBACK,**
Of Counsel.

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Supreme Court of the United States

OCTOBER TERM, 1942.

No. 300.

HOWARD S. PALMER, HENRY B. SAWYER and JAMES LEE
LOOMIS, as Trustees for The New York, New Haven
and Hartford Railroad Company,

Petitioners,

—against—

HOWARD F. HOFFMAN, individually and as Administrator
of the goods, chattels and credits which were of Inez
Hoffman, also known as Inez T. Spraker Hoffman,
deceased,

Respondent.

BRIEF ON BEHALF OF PETITIONERS.

I.

Opinions of the Courts Below.

There was no opinion of the District Court. The majority and minority opinions, original and amended, of the Circuit Court of Appeals for the Second Circuit are reported in 129 F. (2d) 976 (R. 441-489).

II.

Jurisdiction of This Court.

This Court granted petitioners' application for a writ of certiorari on October 12, 1942, — U. S. —, 87 L. ed. Advance Opinions 31 (R. 489).

III.

Statement of the Case.

The complaint alleges that on December 25, 1940, at about 6:15 P. M., while the plaintiff (hereinafter referred to as respondent), Howard F. Hoffman, was driving a Ford coupe at a grade-crossing in West Stockbridge, Massachusetts, the automobile was struck by a locomotive engine operated by the defendants (hereinafter referred to as petitioners), causing injuries to the respondent and the death of his wife, Inez Hoffman (R. 3, 4, 10). The jurisdiction of the United States District Court for the Eastern District of New York was based on diversity of citizenship (R. 3, 29).

The First Cause of Action, on behalf of Howard F. Hoffman, brought under a statute of Massachusetts, alleges petitioners were negligent in failing to ring a bell or blow a whistle on the engine (R. 5, 6). It also sets out that respondent reduced speed, thereafter did stop, look and listen, and did then proceed cautiously over the crossing, in compliance with another statute of Massachusetts (R. 5, 6).

The Second Cause of Action, also on behalf of Howard F. Hoffman, based on the common law, alleges, among other things, that petitioners were negligent in failing to ring a bell or blow a whistle, in failing to have a headlight on the rear end of the locomotive, and in operating the locomotive with its headlight away from the crossing (R. 7-9).

The Third and Fourth Causes of Action, brought by Howard F. Hoffman as administrator of the estate of Inez Hoffman, allege the same common law and statutory negligence claimed in the First and Second Causes of Action (R. 9-11).

The Fifth and Sixth Causes of Action were discontinued (R. 11-14, 29).

On the question of negligence the trial court submitted three issues to the jury—failure to ring a bell, to blow

a whistle, and to have a light burning on the front of the train (R. 382, 383, 385, 386). These issues were closely contested (R. 39, 74, 80, 85, 88, 98, 106, 118-120, 147, 170-171, 191-193, 195-196, 217, 221-222, 230-231, 234, 261-262, 264-266, 267, 275, 296-304, 320-321, 348-349, 356-358, 360, 363-366, 368, 378-379).

Judgment was entered in favor of the respondent, Howard F. Hoffman, individually, in the amount of \$25,077.35, and in favor of Howard F. Hoffman, as administrator of the Estate of Inez Hoffman, in the amount of \$9,000, on November 25, 1941 (R. 435, 436).

In the trial court, a statement of petitioners' engineer, who had died prior to the trial (R. 239), was offered in evidence under 28 U. S. C. §695 (Act of June 20, 1936, c. 640, §1, 49 Stat. 1561; Defendants' Exhibit J for Identification, R. 431-435). Petitioners offered to prove that this statement was signed, using the words of the statute, in the regular course of any business, and that it was the regular course of such business to make such statement. The respondent objected to its introduction in evidence, and the court sustained the objection, granting an exception to the petitioners (R. 381, 382). The Circuit Court of Appeals held that even though the petitioners offered proof that the statement was made in the regular course of business and that it was the regular course of such business to make the statement, it was inadmissible (R. 461, 462).

In the trial court, respondent's witness, Laurence Bona, testified that he gave a signed statement to Mr. Diamond (respondent's attorney of record; R. 85, 86). The court ruled that if petitioners' attorney called for and inspected the statement, the door would be opened for the respondent to offer it in evidence, and if that were done the court would receive it (R. 107, 224). Petitioners' attorney declined to inspect the statement under such conditions (R. 107, 224). The Circuit Court of Appeals held unanimously that this was error, but the majority opinion

says that it was not reversible error because (1) as the statement was not in the record it was impossible to know whether it would have served for impeaching purposes, and whether such impeachment would have materially affected the jury's verdict; and because (2) it could not be said that the trial judge was unreasonable in relying upon *Edison Electric Light Co. v. United States Electric Lighting Co.*, 45 Fed. 55, 59 (C. C. S. D. N. Y., 1891) (R. 473, 474, 483). Respondent's attorney produced the statement, but made no objection to its inspection and no claim that it was irrelevant or a confidential communication (R. 107). Other witnesses called by the respondent had given signed statements to the respondent's attorney but these were not called for (R. 150, 183, 205).

The trial court charged that in the personal injury action the petitioners had the burden of proving contributory negligence (R. 387). Petitioners excepted to the charge, and to the failure to charge petitioners' request No. 16, that in the personal injury action, respondent had the burden of proving freedom from contributory negligence (R. 394, 395, 403). The Circuit Court of Appeals unanimously held that the charge on burden of proof was not erroneous (R. 475, 483).

IV.

Questions Presented.

(1) Whether the Circuit Court of Appeals improperly read into the Act of June 20, 1936, c. 640, §1, 49 Stat. 1561 (1936); 28 U. S. C. §695 (1940), a restriction which supported the trial court's exclusion of a stenographic report of the engineer's examination, offered by the petitioners, even though the statement was signed in the regular course of business and it was the regular course of business to make such statement.

(2) Whether the Circuit Court of Appeals improperly refused to treat as reversible error the denial of petitioners' admitted right to demand and inspect, without any condition attached, a statement made by respondent's witness, unless it appeared that the statement could be used for purposes of such successful impeachment as materially to affect the jury's verdict.

(3) Whether in diversity of citizenship cases the federal courts must follow conflict of laws rules as to burden of proof of contributory negligence prevailing in the states in which they sit, notwithstanding Federal Rule of Civil Procedure 8(c).

V.

Argument.

Summary of the Argument.

POINT I.

The Federal Statute, 49 Stat. 1561 (1936), 28 U. S. C. §695 (1940), makes admissible the report of petitioners' engineer.

A.

The Decision Is Contrary to the Terms of the Statute.

B.

The Decision Is Contrary to the Intent of the Statute, as Shown by Its Background and Legislative History.

C.

The Decision Is Contrary to Authority.

POINT II.

Under the Federal Rules of Civil Procedure and under the Conformity Act, Rev. Stat. §914 (1875), 28 U. S. C. §724 (1940), it was reversible error to hold that, if petitioners' attorney inspected a statement made by respondent's witness, respondent could put the statement in evidence.

POINT III.

In the personal injury action the respondent had the burden of proving freedom from contributory negligence.

POINT I.

The Federal Statute, 49 Stat. 1561 (1936), 28 U. S. C. §695 (1940), makes admissible the report of petitioners' engineer.

Petitioners have given the circumstances under which the trial court sustained the objection to the introduction in evidence of Defendants' Exhibit J for Identification (*supra*, p. 3). This exhibit is a statement of engineer Harold D. McDermott made at an investigation held at the Pittsfield freight office of petitioners on December 27, 1940, two days after the accident (R. 431). McDermott was interviewed by assistant superintendent Cuineen and Mr. Christie of the Massachusetts Public Utilities Commission (R. 431, 434, 435). The statement is clearly relevant on the issues of negligence submitted to the jury—headlight, bell, and whistle.

The accident occurred on December 25, 1940, the statement was taken on December 27, 1940, the suit was started on July 18, 1941, and McDermott, the engineer, had died before the trial, held in November, 1941 (R. 4, 431, 1, 239).

The reasoning of the majority opinion by Judge Frank seems to be that the report was not admissible because it was not made in the "regular course of business"; that it was not made in the "regular course of business" because there was a motive to misrepresent; that no proof of the circumstances was possible to make trustworthiness a fact question for the jury; and that, therefore, it was not possible to treat the report as made in the "regular course of business".

The opinion says that the statement would be excluded under the common law rule because it does not come within the exceptions as to declarations by a deceased witness, and is not a memorandum in the regular course of business within the common law exception (R. 442-449), that is, the motive factor is here present, and the principle of circumstantial guarantee of trustworthiness is inherent in all exceptions to the hearsay rule (R. 446). The opinion then says that the report would be excluded under the federal statute (R. 449-475, 484-488). The statutory words "regular course of business" are words of art, with a settled meaning—"writings made in such a way as to afford some safeguards against the existence of any exceptionally strong bias or powerful motive to misrepresent" (R. 450, 451). The background and legislative history show that Congress did not intend to give to the phrase "regular course of business" any meaning which would do away with safeguards against a motive to misstate (R. 451-455, 484-488).

It is assumed throughout the opinion that the report was made "for use in probable litigation", to supply "evidence in a highly probable lawsuit", "is dripping with motivations to misrepresent", and is "an obviously motivated record" (R. 449, 461, 464). It is assumed that the "extent of the motivation here is so great as to preclude adequate trustworthiness", that "the primary purpose of the employer, obvious from the circumstances, in ordering those reports is to use them in litigation involving those accidents", and that "no proof, then, was possible

that he (engineer) did not have the peculiarly strong motive to misrepresent of the kind which, we hold, precludes its admission" (R. 465, 468).

Judge Clark is "much disturbed by the restriction here read into the remedial statute" (R. 476). He shows that to exclude the report reads into the statute a restriction directly opposed to its intent and plain terms, is contrary to its history and background, and to the views of Wigmore, Morgan, and the makers of the American Law Institute Code of Evidence (R. 476, 477). The decision sets aside the reasoning of several unanimous decisions of the Circuit Court of Appeals for the Second Circuit (R. 476). The restriction is not precise—it is impossible to tell whether it is based on a motive to misrepresent or an anticipated lawsuit (R. 478, 479). The restriction is against the trend of the times and shows a new technique of judicial legislation (R. 479-481).

For a thorough analysis of the *Hoffman* decision in regard to the effect of Section 695, petitioners call attention to Note (1942) 56 Harvard Law Review 458, entitled "*Hoffman v. Palmer: Admissibility at Common Law and under the Model Act of Business Records Made by a Third Party with Incentive to Misrepresent*", initialed by John M. Maguire, Professor in the Harvard Law School, Assistant Reporter of the Committee On Evidence of The American Law Institute.

A. The Decision Is Contrary to the Terms of the Statute.

Petitioners are of the opinion that Judge Clark is correct in treating the terms of the statute as plain and unambiguous. The statute reads as follows:

"ADMISSIBILITY. In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of said act, transac-

tion, occurrence, or event, if it shall appear that it was made in the regular course of any business, and that it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter. All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but they shall not affect its admissibility. The term 'business' shall include business, profession, occupation, and calling of every kind." 49 Stat. 1561; 28 U. S. C. §695.

In spite of this language the opinion reads into the statute one restriction not expressed, and reads out of the statute a provision very clearly expressed.

In 1820 Chief Justice Marshall said:

"Where there is no ambiguity in the words, there is no room for construction." *United States v. Wiltberger*, 5 Wheat. 76, 95, 96.

In 1867 Justice Swayne said:

"If the language be clear it is conclusive. There can be no construction where there is nothing to construe. The words must not be narrowed to the exclusion of what the legislature intended to embrace; but that intention must be gathered from the words, and they must be such as to leave no room for a reasonable doubt upon the subject. It must not be defeated by a forced and over-strict construction." *United States v. Hartwell*, 6 Wall. 385, 396.

Admitting that a clearly expressed legislative intention removes his common law test of trustworthiness, Judge Frank says that here there is no such expressed intention, and that, therefore, common law meanings must hold

(R. 450, 452). This method of statutory construction, what Judge Clark calls "a new technique of judicial legislation" (R. 480, 481), applied here, leads to illogical results. For example, contemporaneity was expressly carried over into the statute. Judge Clark points out that other common law requirements—death or absence of the entrant; regular course of business, with duty owed to a third person; regularity of entry; no motive to misrepresent; a writing—would all be held part of the statute under this method, unless expressly excluded (R. 481).

Judge Frank gives no adequate explanation of the sentence "All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but they shall not affect its admissibility" (R. 455, 456). There should be no great difficulty in giving effect to this plain language. Professor Morgan has written that in the earlier cases dealing with hearsay the chief inquiry concerned itself with the necessity for use rather than elements of trustworthiness. "What, then, is the conclusion of the whole matter? The rationale of the exceptions to the rule excluding hearsay is that the circumstances of the utterance furnish reasonably adequate information for a satisfactory appraisal of its probative value, and there is a necessity for its use." Morgan, *The Relation Between Hearsay and Preserved Memory* (1927) 40 Harvard Law Review 712, 732.

The opinion does not recognize the possibility of truth in the engineer, or in his employers. It is possible that two days after the accident, when he gave the statement, the engineer did not anticipate a claim or lawsuit. Any weakness to tell an untruth might show itself at the trial rather than two days after the occurrence. The jury might not give great weight to a claimed motive of fear of litigation. Very few of the reported fort cases show the employee a co-defendant. The jury might

not be impressed with any claimed fear of loss of job for a claimed single act of negligence in 33 years of service, 22 years as an engineer (R. 431). The jury might conclude, in weighing the circumstances under which the statement was taken, that sometimes engineers do blow whistles for crossings and have headlights burning, even for their own protection. While McDermott could not be cross examined because dead, all the circumstances of his statement could be examined. It is likewise possible that petitioners themselves, as a guide to the future, wanted a truthful statement from their employee.

Throughout his opinion Judge Frank expresses a fear of lack of motive to speak the truth. In the first place, this was a question for the jury, rather than for the trial court. In the second place, the trial court refused to hear evidence as to the "circumstances" under which the statement was taken. In the third place, there are recognized safeguards against inaccuracy and untrustworthiness. It has been held that a reasonable safeguard is to leave "the records from which they (statements) are compiled freely at the disposal of the adverse party". *Northern Pac. Ry. Co. v. Keyes*, 91 Fed. 47, 59 (C. C. D. N. D. 1898). It has been held that entries prepared in the ordinary routine are warranted as to reliability. *Landay v. United States*, 108 F. (2d) 698, 704 (C. C. A. 6th, 1939), *cert. denied*, 309 U. S. 681 (1940).

The trial judge did not permit petitioners to prove that the engineer's statement was signed by him in the regular course of business and that it was the regular course of business to make such statement (R. 381, 435). This proof, if allowed, would have been subject to cross examination as to the "circumstances of the making", and to comment by the trial judge in his charge to the jury.

W. E. Christie, of the Massachusetts Public Utilities Commission, was present at the investigation (R. 431), and took part in the questioning (R. 434, 435). It was "a

dignified inquiry in the presence of a state official" (Note 1, R. 476, Judge Clark's Opinion). See Mass. Gen. Laws (1932) c. 159, §§27-29, which show the interest of the Commission in the investigation. Petitioners refer to Section 29 (set out in Appendix, *infra*, p. 34) as particularly applicable.

Safeguards against inaccuracy and untrustworthiness already appear as a matter of record. Petitioners should have been allowed to prove other "circumstances" so that the jury could determine the weight to be given to the statement. Judge Frank has an unreasonable fear of this procedure. "If the rules excluding relevant testimony tendered by competent witnesses had their origin in a supposed inferiority of jurors to judges, they need serious re-examination in this country." Morgan, *Functions of Judge and Jury in the Determination of Preliminary Questions of Fact* (1929) 43 Harvard Law Review 165, 191.

The majority opinion not only resorts to language construction where no ambiguity of language and no necessity exist, but construes the statute contrary to its express terms.

B. The Decision Is Contrary to the Intent of the Statute, as Shown by Its Background and Legislative History.

Hearsay Rule and its common law exceptions.

The common law recognized a necessity in the case of death, insanity, or absence from the jurisdiction, for hearsay proof of the activities of a large business. *The Spica*, 289 Fed. 436 (C. C. A. 2d, 1923). Some courts did not require proof that the original observer was unavailable, or that the entrant had personal knowledge, or even that the entrant was unavailable. *Chesapeake & O. Ry. Co. v. Stojanowski*, 191 Fed. 720 (C. C. A. 2d, 1911); *Massachusetts Bonding & Ins. Co. v. Norwich*

Pharmaceutical Co., 18 F. (2d) 934 (C. C. A. 2d, 1927). This indicated a trend but the liberalization was neither general nor uniform nor rapid. See Morgan & Maguire, *Looking Backward & Forward at Evidence* (1937) 30 Harvard Law Review 909, 921-922. Wigmore urged that it should be sufficient if books were verified on the stand by a supervising officer who knew them to be the books of regular entries kept in his establishment. 3 Wigmore, *Evidence* (3d ed. 1940) §1520. The Legal Research Committee of the Commonwealth Fund wrote:

"A few courts only have accepted Mr. Wigmore's theory. They are growing in number, but the process of reaching this proper end by judicial decision is altogether too slow and uncertain." Morgan & others, *The Law of Evidence: Some Proposals for Its Reform* (1927) 51, 63.

The majority opinion relies upon a theory or technique of construction of the phrase "regular course of business", to the effect that it has a common law meaning which must be carried over into the statute. Among the circumstances of significance is the non-existence of a controversy in which the declarant has a personal interest, although, at times, Judge Frank seems to be willing to disregard immediacy of litigation (R. 444, 446, 461, 465). Another circumstance is motive to misrepresent. As to the first, this Court in *Rowland v. St. Louis & S. F. R. R. Co.*, 244 U. S. 106 (1917) set aside the objection to reports prepared by the railroad to determine the division of expense and income between state and interstate business. As to the second, Judge Clark points out that a general application of the test of "motive to misrepresent" would exclude all entries of past events, and a limited application would call for a subjective test, uncertain and unsatisfactory (R. 479).

In *Sullivan v. Minneapolis Street Ry. Co.*, 161 Minn. 45 (1924), the plaintiff claimed that she was injured by an

emergency stop while a passenger on defendant's street car. At the time defendant had a rule requiring every motorman to make a report at once on every emergency stop. Over plaintiff's objection defendant put in evidence the motorman's report made immediately after the accident and turned in before he knew any one claimed to have been injured. The opinion says that the report was pertinent and convincing, while recognizing that "the existence of the rule was perhaps for the purpose of getting the facts causing and surrounding an emergency stop so that they would be known and available if claim arose out of such stop" (p. 53). It is obvious that defendant's rule in the Minnesota case had in mind possible claims for injuries as the result of emergency stops. A jury might have given great or little weight to the report under the circumstances, but it was admitted for consideration by the jury.

The Model Act of 1927.

To speed the slow progress of the common law in respect of exceptions to the hearsay rule, and to remove confusion, the Committee of the Commonwealth Fund suggested the Model Act of 1927, followed in eight states.¹ See Morgan, *et al.*, Evidence, *supra*, 63. Wigmore had no thought of a restrictive interpretation of the Model Act. 5 Wigmore, Evidence, *supra*, §1530a. There is nothing from Morgan in support of restriction. Morgan *et al.*, Evidence, *supra*, 51-63.

The framers of the Model Act (later codified as 28 U. S. C. §695) considered as pertinent three of the exceptions to the hearsay rule—the shop-book doctrine, the

¹ Ala. Code 1940, tit. 7, §415; Conn. Gen. Stat., Supp. 1935, §1675c; Me. Laws, 1933, c. 59; Md. Ann. Code (Flack, 1939), art. 35, §68; Mass. Gen. Laws (1932) c. 233, §78; Mich. Comp. Laws (Mason Cum. Supp. 1940) §14297; N. Y. Civ. Pr. Act §371a; and R. I. Gen. Laws Ann. (1938) c. 538, §1.

use of memoranda to revive memory or as records of past recollection, and the doctrine admitting entries made in the regular course of business. Morgan, *et al.*, Evidence, *supra*, 51 *et seq.* Judge Frank says that Section 695 has two objectives: (1) to make uniform the regular course of business exception to the hearsay rule in one respect only (where there is a regular system of making entries and the system is likely to ensure accuracy, it is not necessary to introduce the evidence of the entrants); and (2) to relax the common law requirements as to form of writing, broaden the definition of business, and possibly to remove the necessity of calling many witnesses (R. 454-456, 484, 487, 488). These objectives mentioned by Judge Frank are confined to "entries made in the regular course of business", and do not refer to the other two exceptions to the hearsay rule considered by the framers of the Model Act. It is not, therefore, reasonable to treat Section 695 as the codification of a single exception to the hearsay rule.

Legislative history of the Statute of 1936.

All this was the general background. Petitioners now come to the legislative history of the Act itself. Judge Frank amended his opinion to refer to the Report of the Senate Judiciary Committee in connection with the bill which became 28 U. S. C. §695 (R. 484-488). The Report consists of a letter from the Attorney General and a memorandum enclosed with the letter (R. 484). The Attorney General gave one reason, probably because it was of particular interest to his Department in the prosecution of criminal cases, for recommending passage—to secure uniformity in the federal courts as to proof of book entries without identification by the persons making them. He shows that the old common law rule had been modified in four circuit courts of appeals, many district courts, and in a number of state courts. Judge Clark

dismisses the argument of limited objective advanced by the majority opinion, in these words:

"And Attorney General Cummings, in recommending the legislation to Congress, merely rehearsed this background without in any way suggesting the completely stultifying addition here made to the statute" (R. 488, 489).²

C. The Decision Is Contrary to Authority.

Cases under Section 695.

The federal courts have construed Section 695 with liberality. In *Hunter v. Derby Foods*, 110 F. (2d) 970 (C. C. A. 2d, 1940), plaintiff's intestate died after an illness of eight or nine hours. Plaintiff alleged that death was caused by eating canned meat prepared or distributed by defendant, and offered in evidence the death certificate signed by the coroner in the course of his official duty under the laws of Ohio. The opinion by Judge Patterson points out that although there was evidence tending to impeach the certificate, that went to the weight, and it was admissible under Section 695.

In *Ulm v. Moore-McCormack Lines*, 115 F. (2d) 492 (C. C. A. 2d, 1940), hospital records were held admissible without calling the doctors who made them. The difficulty of calling many witnesses was not involved. See same case on rehearing, 117 F. (2d) 222 (1941), *cert. denied*, 313 U. S. 567 (1941). Also Note (1941) 11 Brooklyn Law Review 78-89.

In *United States v. Mortimer*, 118 F. (2d) 266 (C. C. A. 2d, 1941), *cert. denied*, 314 U. S. 616 (1941), the trial

² Other Committee Reports on the bill were substantially identical. There was no debate in Congress. 80 Cong. Rec. 3412, 3468, 4243, 4884, 5733, 5734, 5760, 6038, 6254, 9151-9152, 9645-9647, 9648, 9804, 9863, 9998, 10701 (1936).

court admitted in evidence charts purporting to show defaults in the payment of taxes. These charts had been prepared by an accountant, a witness for the prosecution. They were made in the regular course of business, although made in preparing evidence for trial. Judge Clark wrote the opinion. In the present case he says:

"Since the first cave man made notches on a stick, I had supposed that both the purpose and the value of records were their use in future disputes—to prevent many, to settle others. As a matter of fact, this very argument was considered at length and rejected on the authorities by us in *United States v. Mortimer, supra*" (R. 479).

Reed v. Order of United Commercial Travelers, 123 F. (2d) 252 (C. C. A. 2d, 1941), held that a hospital case record was admissible which read in part "Was reacting very well—still apparently well under influence of alcohol." It was pointed out in the *per curiam* opinion (joined in by Judge Frank) that the surgeon's statement was a diagnosis, was an "act, transaction, occurrence, or event" within the meaning of the statute, 28 U. S. C. §695.

Cases under similar statutes.

The Circuit Court of Appeals for the Second Circuit, in *Gelbin v. New York, N. H. & H. R. Co.*, 62 F. (2d) 500 (1933), held admissible under Section 374-a of the Civil Practice Act of New York (set out in Appendix, *infra*, p. 34; derived from the 1927 Model Act) a record made by an employee of the State Department of Public Works whose duty it was to paint a highway sign. The condition of the sign was in issue and the employee was responsible for its condition.

The case of *Needle v. New York Railways Corporation*, 227 App. Div. 276 (1st Dep't 1929), *aff'd*, 256 N. Y. 616 (1931), was a personal injury action under Section 374-a

of the Civil Practice Act. Defendant offered in evidence a police blotter which contained a report of a police officer. The police officer did not see the accident but based his report upon statements made to him by third parties, including the motorman of defendant's trolley car. The police officer's report contained the statement "Responsibility Pedestrian". The Appellate Division held that it was error to admit the blotter in evidence because (1) the statements made to the police officer were not made by any person in the regular course of any business (this would include the motorman), and (2) the statement of the motorman was a conclusion, and unreliable because of interest. Substantially, the opinion merely reads into the statute the requirement that the original report must be made in the regular course of business. (1930) 43 Harvard Law Review 960, 961. The motorman's statement was an expression of opinion, not made in the regular course of business. In pointing up the language of the opinion as to motive Judge Frank has hung too much on too little (R. 452-453; 458-461).

Section 695 is not borrowed from New York but from the Model Act. *Ulm v. Moore-McCormack Lines*, *supra*, 115 F. (2d) 492, 495. In construing Section 695, the interpretation of Section 374-a by New York courts is persuasive only if reasonable.

Substantially similar statutes have been construed liberally. Ch. 535, Massachusetts Laws of 1898, provided:

"No declaration of a deceased person shall be excluded as evidence on the ground of its being hearsay if it appears to the satisfaction of the judge to have been made in good faith before the beginning of the suit and upon the personal knowledge of the declarant."

In *O'Driscoll v. Lynn & Boston Railroad*, 180 Mass. 187 (1902), a personal injury action, the railroad put in evidence, under the above statute, a statement of their doctor

who died prior to the suit, and who had made an examination after the accident. In an opinion by Holmes, C. J., the statement was held to be admissible and to have met the requirements of the statute, including that of "good faith."

In *Nagle v. Boston & Northern Street Ry.*, 188 Mass. 38 (1905), the trial court allowed in evidence declarations of deceased motorman as to an order he received, in an action by the administratrix of his estate. The Supreme Judicial Court held the declarations were properly admitted under R. L. c. 175, §66 (set out in Appendix, *infra*, p. 34), and that the weight and inferences to be drawn from the evidence were for the jury.

In *Chaput v. Haverhill, Georgetown, etc. Ry.*, 194 Mass. 218 (1907), under the same statute as that in the *Nagle* case, plaintiff's deceased suffered injuries from which he died, and it was held that his declarations were admissible, notwithstanding there was no opportunity to cross examine.

In *American Ry. Express Co. v. Rowe*, 14 F. (2d) 269 (C. C. A. 1st, 1926), *cert. denied*, 273 U. S. 743 (1927), an action to recover damages for conscious pain and suffering and death, it was held that statements made by the deceased to an attorney (later appointed executor), while in a hospital, after the accident, were admissible, under Mass. Gen. Laws (1932) c. 233, §65 (formerly R. L. c. 175, §66).

Referring to the same statute as in the *American Ry. Express Co.* case, Chief Justice Rugg, in *Matter of Keenan*, 287 Mass. 577 (1934), says:

"This statute made a considerable change in the law of evidence. It requires declarations or statements to be received which under the common law were excluded because obnoxious to the rule against hearsay

evidence. It was designed to remedy a defect in the law of evidence as theretofore administered. It ought to be and has been consistently construed liberally to extend rather than to restrict the intended relief and to effectuate its corrective purpose" (pp. 580, 581).

The Committee of the Commonwealth Fund prepared *The Law of Evidence: Some Proposals for Its Reform*, *supra*. One chapter discusses the admission of the declarations of deceased and insane persons (pp. 37-49). It quotes c. 535, Acts of Mass., 1898, *supra*, and a similar provision in then c. 233, §65, Mass. Gen. Laws (p. 39), and recommends the adoption of a substantially similar statute as to declarations by a deceased or insane person in all jurisdictions (pp. 48, 49). In another chapter of the same report the Committee recommends a statute covering entries in the regular course of business (p. 63). With the Massachusetts law settled as to the interpretation of the statutes relating to the declarations of deceased and insane persons, that motive affects the weight, not the admissibility, it would appear that the Committee expected the same interpretation for both proposed statutes.

The case of *Lyman B. Brooks Co. v. Wilson*, 218 Mass. 205 (1914), was an action to recover money claimed to be due plaintiff. Ch. 288 of the Laws of 1913³ provided: " * * * an entry in an account kept in a book * * * shall not be inadmissible in any civil proceeding as evidence of the facts therein stated because * * * it is hearsay or self-serving, if the court finds that the entry was made in good faith in the regular course of business and before the beginning of the civil proceeding aforesaid." The opinion says:

"This is an exception to the general rule as to the admissibility of self-serving statements made by a

³ This is a predecessor to present c. 233, §78, Mass. Gen. Laws. (1932), the Massachusetts statute which followed the Model Act of 1927 (see *supra*, n. 1, p. 14).

party to an action in court. * * * What weight should be given to evidence of this kind in view of the general rule of the common law, is for the jury or the judge (if the case is tried without a jury) to decide. But the evidence has been made competent by the statute and cannot be objected to if offered in evidence" (p. 209).

Liberal interpretation—modern trend.

The liberal interpretation adopted by Judge Clark and urged by petitioners is in line with the modern trend in the law of evidence. Petitioners have already referred to the Model Act of 1927. After the Model Act came the Federal Act of 1936, 49 Stat. 1561, 28 U. S. C. §695, derived from it. In 1936 the Commissioners of Uniform State Laws proposed the Uniform Act, adopted in twelve jurisdictions.⁴ Finally, the American Law Institute has brought out a Code of Evidence (1942) and we refer particularly to Rule 514 (set out with Comment in Appendix, *infra*, p. 36). Rule 514 closely resembles Section 695. The Comment makes clear that under this Rule the question of motive has no effect upon the question of admissibility. Some of these proposals and statutes are reviewed in 5 Wigmore, Evidence, *supra*, §1520, and in Legis. (1934) 47 Harvard Law Review 1044-1054.

The modern trend of liberal interpretation is also emphasized by Federal Rule 43 (a), 28 U. S. C., following §723e (set out in Appendix, *infra*, p. 33). *Ulm v. Moore-McCormack Lines*, *supra*, 117 F. (2d) 222, 224. See 3 Moore, Federal Practice (1938) 3060.

⁴ Cal. Code Civil Proc. (Deering, 1941) §§1953e-h; Hawaii Laws 1941, c. 109; Idaho Code Ann. (Anderson & Green, Supp. 1940) §16-401A; Minn. Stat. (1941) §§600.01-.04; Mont. Rev. Codes Ann. (Darlington, Supp. 1939) §§10576.1-.5; N. D. Laws 1937, c. 194; Ohio Code Ann. (Throckmorton, 1940) §§12102-22 *et seq.*; Ore. Comp. Laws Ann. (Supp. 1941) §§2-819 *et seq.*; Pa. Stat. Ann. (Purdon, Supp. 1942) tit. 28, §§91a-d; S. D. Code (1939) §36.1001; Vt. Laws 1939, no. 48; Wyo. Laws 1941, c. 82.

Analysis of the terms of the statute, examination of its general background and legislative history, recognition of the modern trend toward liberal interpretation, make clear that this decision unreasonably limits the field of operation and defeats the very purpose of the statute.

POINT II.

Under the Federal Rules of Civil Procedure and under the Conformity Act, Rev. Stat. §914 (1875), 28 U. S. C. §724 (1940), it was reversible error to hold that, if petitioners' attorney inspected a statement made by respondent's witness, respondent could put the statement in evidence.

Petitioners have shown the circumstances under which the trial judge ruled that if petitioners' attorney called for and inspected a statement signed by respondent's witness, Laurence Bona, it would be admissible in evidence for respondent; that the Circuit Court of Appeals unanimously ruled that this was erroneous; but that the majority opinion held it was not reversible error (*supra*, pp. 3, 4).

According to the opinion the decision of the trial judge was contrary to "liberal pre-trial discovery" (R. 471), and could not be "reconciled with the liberality as to depositions and discovery contained in the new Rules" (R. 473), particularly Rule 26(b) (set out in Appendix, *infra*, p. 32).

The majority opinion of the Circuit Court of Appeals says the error of the trial judge is not reversible for two reasons: (1) the statement, not in the record, might not impeach, and (2) the trial judge was not unreasonable in relying upon an old equity case (R. 473, 474). Petitioners submit that neither reason is adequate.

Under Rule 26 (b) deponent may be examined regarding any relevant matter, including documents. The em-

phasis is placed on the examination, permitted whether or not the writing serves as a basis for impeachment and whether or not such impeachment will materially affect the jury's verdict. The right is the right of examination.

The conclusion of the majority that the admitted error of the trial judge was not reversible also fails to consider that part of Rule 26 (b) which reads that deponent may be examined regarding any matter relevant to the subject matter "whether relating to the claim or defense of the examining party, or to the claim or defense of any other party". See 3 Ohlinger, *Federal Practice* (1939) 450. Discovery is no longer limited to facts supporting the case of the party seeking it. 2 Moore, *Federal Practice, supra*, 2439. The district courts have recognized that one party may inquire into the case of the other party. *Nichols v. Sanborn Co.*, 24 F. Supp. 908, 910 (D. Mass. 1938); *Newcomb v. Universal Match Corporation*, 25 F. Supp. 169, 171 (E. D. N. Y. 1938); *Dixon v. Sunshine Bys Lines*, 27 F. Supp. 797 (W. D. La. 1939).

Rule 34 (set out in Appendix, *infra*, p. 32) provides that upon motion the court may order a party to produce and permit the inspection of any designated document, which contains material evidence, not privileged, in the possession of the party. The Rule may be used before or at the trial. The right of inspection is independent of the question of impeachment.

The opinion of Judge Frank says that the court refused to reverse because the statement is not before it (R. 473, 474). He recognizes liberality as to deposition and discovery, but immediately restricts the ruling. Petitioners submit that the liberality should include the right of examination, not merely the right of examination of a paper which would lead to such impeachment of a witness as materially to affect the jury's verdict. Such limited right would always depend on the contents of the paper.

The opinion also says that the trial judge should have dealt with the request as if it had arisen under Rule 26(b), but the court would not reverse because, among other reasons, the trial judge did not act unreasonably in relying upon an equity case (R. 474). This is an unusual ground of affirmance of an erroneous ruling.

The Conformity Act (Rev. Stat. §914 (1875), 28 U. S. C. §724 (1940); set out in Appendix, *infra*, p. 33) may well come into play on the theory that literally neither Rule 26(b) nor Rule 34 is applicable to the situation. The Conformity Act would require the adoption of the New York rule as to inspection of documents, which allows unqualified right of inspection, free from any such conditions as have been imposed. *Smith v. Rentz*, 131 N. Y. 169 (1892) and cases cited therein.

In *Sibbach v. Wilson & Co.*, 312 U. S. 1, 10 (1941), a case involving the validity of Rules 35 and 37, the majority opinion says that the Rules repealed the Conformity Act, but petitioners respectfully submit that the Act, while largely superseded, still has force when not in conflict with the Rules. See Enabling Act of June 19, 1934, c. 651, §§1, 2; 48 Stat. 1064 (1934); 28 U. S. C. §723b, c (1940) (set out in Appendix, *infra*, p. 31); and Green, *The Admissibility of Evidence under the Federal Rules* (1941) 35 Harvard Law Review 197, 204.

If the new Rules cover the entire field of civil procedure, the decision of the trial court constitutes reversible error. If the Conformity Act is applicable, because the Rules are not deemed to cover the right of inspection during the trial, the decision of the trial court likewise constitutes reversible error.

POINT III.

In the personal injury action the respondent had the burden of proving freedom from contributory negligence.

The trial court charged that the petitioners had the burden of proving contributory negligence (R. 387). Petitioners excepted to this part of the charge and to the failure to charge Request No. 16 that in the personal injury action respondent had the burden of proving freedom from contributory negligence (R. 394, 395, 403).

The Circuit Court of Appeals admits that it would turn to the decisions of the New York courts, including those relating to conflict of laws, if it were to reject Federal Rule of Civil Procedure 8(c) (R. 475; Rule 8(c) set out in Appendix, *infra*, p. 31). Judge Frank refuses to decide whether the Rule should be disregarded because burden of proof is a matter of substance, on the theory that under the Rule and under the New York law the result is the same (R. 475). Petitioners' position is that Rule 8(c) does not apply, and that the New York conflicts law places the burden of proof upon the respondent.

From *Swift v. Tyson*, 16 Pet. 1 (1842) to *Eric R. Co. v. Tompkins*, 304 U. S. 64 (1938), the federal courts treated burden of proof of contributory negligence as a matter of substantive general law. In *Eric R. Co. v. Tompkins*, the plaintiff sued in the United States District Court for the Southern District of New York for injuries received in Pennsylvania. This Court held that the state substantive law of Pennsylvania was applicable, but did not say whether this was so by virtue of New York conflicts law or because of a general conflicts rule which would look to the *lex loci delicti*. In *Klaxon Co. v. Stentor Co.*, 313 U. S. 487 (1941), this Court held that the federal court should follow the conflicts rule of the state where it is sitting.

Because conflict of laws rules are within the sphere of substantive law.

The aim of *Eric R. Co. v. Tompkins*, *supra*, was to produce a conformity of result between actions brought in the state and federal courts. Applying this rationale to the case at bar, New York law should govern in a case in the federal court sitting in New York. *See* opinion of Judge Magruder in *Sampson v. Channell*, 110 F. (2d) 754 (C. C. A. 1st, 1940), *cert. denied*, 310 U. S. 650 (1940), which case was approved in *Klaxon Co. v. Stentor Co.*, *supra*, 313 U. S. 487, and in *Griffin v. McCoach*, 313 U. S. 498 (1941). We have here a diversity of citizenship case, brought in the federal court sitting in New York, for damages on account of an accident in Massachusetts. It involves the rule of New York as to conflict of laws. New York is free to determine whether a given matter is governed by the law of the forum or by some other law. The federal court usually does not make an independent determination in the field of conflict of laws. These general principles, growing out of *Eric R. Co. v. Tompkins*, *supra*, are of importance in the consideration of Federal Rule 8(c).

Petitioners submit that Federal Rule 8(c) does not apply. In the first place, it expressly refers to a rule of pleading. *Sampson v. Channell*, *supra*, 110 F. (2d) 754, 757; followed in *Fair Dodge Hotel Co. v. Bartlett*, 119 F. (2d) 253, 258, 259 (C. C. A. 8th, 1941). In the second place, it does not apply because a long line of federal decisions holds that the matter of burden of proof as to contributory negligence is not procedural but concerns substantive rights—substantive in the sense of importance in the determination of a case. *Sampson v. Channell*, *supra*, 110 F. (2d) 754, 755; *Garrett v. Moore McCormack Co.*, 11 U. S. L. Week 4057, 4059 (U. S., December 14, 1942). In *Cities Service Co. v. Dundap*, 308 U. S. 208 (1939), this Court held that a federal court should follow

the state rule on burden of proof when it relates to a substantial right. The Enabling Act of June 19, 1934, *supra*, recognizes this principle in providing that the Rules "shall neither abridge, enlarge, nor modify the substantive rights of any litigant". The Act is restricted to matters of pleading and court practice and procedure. *Sibbach v. Wilson & Co., supra*, 312 U. S. 1, 10.

While a sharp conflict has developed between *Eric R. Co. v. Tompkins, supra*, 304 U. S. 64, and the Federal Rules (see Note [1938] 38 Columbia Law Review 1472, 1478), from a policy point of view conformity—the underlying principle of *Eric R. Co. v. Tompkins, supra*—would be best served by limiting Rule 8(c) to pleading, and not including burden of proof as to contributory negligence.

The New York conflicts law places upon the respondent the burden of proving freedom from contributory negligence. Petitioners confine their examination of the New York cases to the conflict of laws decisions, rather than to the purely internal law decisions. For this approach see Cheatham, Book Review (1941) 55 Harvard Law Review 164, 166.

Geoghegan v. The Atlas Steamship Co., 3 Misc. 224 (1893), *aff'd*, 146 N. Y. 369 (1895), was an action brought by plaintiff, as administratrix, for defendant's alleged negligence in a foreign port, resulting in the death of plaintiff's intestate. The court held that the rights of the parties were determined by the law of the place of injury but that "the law of the forum regulates the burden of proof (of freedom from contributory negligence) and the quantum of evidence requisite to a recovery" (p. 227).

In *Wright v. Palmison*, 237 App. Div. 22 (2d Dep't 1932), the plaintiff, injured in Massachusetts, sued for damages based upon negligence. Defendants appealed from a judgment for the plaintiff on the ground that the burden of proof as to contributory negligence was

erroneously placed on them. The Appellate Division reversed the judgment, holding that in an action brought in New York, the New York courts follow the burden of proof rule in force in that state. The Court said, at page 22:

"Proof of freedom from contributory negligence must be forthcoming from the plaintiff in an action for damages based upon the negligence of the defendant, and even though defendant's negligence is determined by the law of the State where the accident occurred, as a matter of substantive right, the rule governing proof of freedom from contributory negligence is a matter of procedure, and the burden of establishing it is to be applied in an action tried in our courts in accordance with the law of this State. (*Sackheim v. Piqueron*, 215 N. Y. 62; and see *Fitzpatrick v. International R. Co.*, 252 id. 127; 134, 135.)"

See *Goodrich, Conflict of Laws* (1938) 200, citing *Wright v. Palmison*, *supra*.

Wright v. Palmison, *supra*, was followed in *Clark v. Harnischfeger Sales Corporation*, 238 App. Div. 493 (2d Dep't 1933). Suit was brought for damages on account of personal injuries arising out of an accident in Pennsylvania. It was held that proof of freedom from contributory negligence was governed by New York law, not by that of Pennsylvania.

Section 601, Restatement, Conflict of Laws (1934), reads as follows:

"FREEDOM FROM FAULT.

"If the law of the forum makes it a condition of maintaining an action that the party bringing the action show himself free from fault, the condition must be fulfilled though there is no such requirement in the state where the cause of action arose."

Judge Frank says (R. 475) that the New York courts, in a case such as this, would apply, as a matter of conflict of laws, the Massachusetts law, citing *Fitzpatrick v. International Ry. Co.*, 252 N. Y. 127 (1929). That was a personal injury action brought in New York, but based solely on the Ontario Contributory Negligence Act (set out in Appendix, *infra*, p. 335). By New York law, there is no recovery for a plaintiff in a personal injury action who is guilty of contributory negligence. The trial judge had charged that the burden of proving contributory negligence was on the defendant pursuant to the Ontario statute. Sustaining that charge, the Court of Appeals said:

"As we have said, the Ontario act goes beyond a matter of procedure and gives a right unknown to the common law, the right of an injured person to recover for another's negligence, even though contributing by his own neglect to bring it about. For these reasons the trial court was quite correct in charging the jury in accordance with the Ontario statute" (p. 135).

And as to New York law:

"The law of the State of New York has no application under such circumstances; it is impossible of application. As a mere matter of procedure, the plaintiff here must prove his freedom from contributory negligence but if in his proof he fails to establish his freedom from contributory neglect or shows that he was neglectful, his complaint must be dismissed. He has no cause of action" (pp. 134, 135).

The Court of Appeals applied a foreign *substantive* right which granted a recovery to one guilty of contributory negligence. 3 Beale, Conflict of Laws (1935) §595.1, §595.3; Note (1941) 26 Washington University

Law Quarterly 244, 247-248. In *Jarrett v. Wabash Ry. Co.*, 57 F. (2d) 669, 671 (1932), *cert. denied*, 287 U. S. 627 (1932), a case involving the same Ontario statute as in the *Fitzpatrick* case, the Circuit Court of Appeals for the Second Circuit held that such statute created a substantive right, and cited that case to that effect. There is, then, nothing in the *Fitzpatrick* case contrary to the view that as a rule of conflict of laws, New York regards the burden of proving freedom from contributory negligence as a matter of procedure, and applies its own law. On the other hand, the intimation in that case to the effect that if a substantive right had not been involved, the decision would have been the other way (252 N. Y. 127, 135), is in complete accord with the position taken by petitioners.

In brief, Rule 8(c) is not applicable, and, in the personal injury action, respondent had the burden of proving freedom from contributory negligence, by virtue of New York conflict of laws decisions.

CONCLUSION.

It is respectfully submitted that the decree of the Circuit Court of Appeals for the Second Circuit should be reversed.

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R. J. SEIFERT,

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Of Counsel.

Appendix.

STATUTES INVOLVED.

Enabling Act of June 19, 1934, c. 651, § 1, 2; 48 Stat. 1064 (1934); 28 U. S. C. § 723b, c (1940), reads as follows:

"The Supreme Court of the United States shall have the power to prescribe, by general rules, for the district courts of the United States and for the courts of the District of Columbia, the form of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law. Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant. They shall take effect six months after their promulgation, and thereafter all laws in conflict therewith shall be of no further force or effect.

"The court may at any time unite the general rules prescribed by it for cases in equity with those in actions at law so as to secure one form of civil action and procedure for both: *Provided, however,* That in such union of rules the right of trial by jury as at common law and declared by the seventh amendment to the Constitution shall be preserved to the parties inviolate. Such united rules shall not take effect until they shall have been reported to Congress by the Attorney General at the beginning of a regular session thereof and until after the close of such session."

Rule 8 (c), Federal Rules of Civil Procedure, 28 U. S. C. following § 723c (1940), reads as follows:

"AFFIRMATIVE DEFENSES. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, as

sumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation."

Rule 26 (b), Federal Rules of Civil Procedure, 28 U. S. C. following §723c (1940), reads as follows:

"SCOPE OF EXAMINATION. Unless otherwise ordered by the court as provided by Rule 30 (b) or (d), the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether relating to the claim or defense of the examining party or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of relevant facts."

Rule 34, Federal Rules of Civil Procedure, 28 U. S. C. following §723c (1940), reads as follows:

"Upon motion of any party showing good cause therefor and upon notice to all other parties, the court in which an action is pending may (1) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, not privileged, which constitute or contain evidence material to any matter involved in the

action and which are in his possession, custody, or control; or (2) order any party to permit entry upon designated land or other property in his possession or control for the purpose of inspecting, measuring, surveying, or photographing the property or any designated relevant object or operation thereon. The order shall specify the time, place, and manner of making the inspection and taking the copies and photographs and may prescribe such terms and conditions as are just."

Rule 43 (a), Federal Rules of Civil Procedure, 28 U. S. C. following §723c (1940), reads as follows:

"Form and Admissibility. In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by these rules. All evidence shall be admitted which is admissible under the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court is held. In any case, the statute or rule which favors the reception of the evidence governs and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is herein made. The competency of a witness to testify shall be determined in like manner."

Conformity Act, Rev. Stat. §914 (1875); 28 U. S. C. §724 (1940), reads as follows:

"CONFORMITY TO PRACTICE IN STATE COURTS. The practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the district courts, shall conform, as near as may be, to the practice, pleadings, and forms and

~~modes of proceeding existing at the time in like causes in the courts of record of the State within which such district courts are held, any rule of court to the contrary notwithstanding."~~

Section 66, Chapter 175, Revised Laws of Massachusetts, reads as follows:

"A declaration of a deceased person shall not be inadmissible in evidence as hearsay if the court finds that it was made in good faith before the commencement of the action and upon the personal knowledge of the declarant."

Section 29, Chapter 159, General Laws of Massachusetts (1932), reads as follows:

"An inspector shall, under the direction of the department, investigate as promptly as may be any accident upon a railroad or railway, or resulting from the operation thereof, which causes the death or imperils the life of any person, and shall report thereon to the department, which shall investigate the cause of any such accident resulting in loss of life, and may investigate any other accident. The inspector shall attend the inquest held in case of any such death by accident and may cause any person who has knowledge of the facts or circumstances connected with such death to be summoned as a witness to testify at the inquest."

Section 374-a, New York Civil Practice Act, reads as follows:

"ADMISSIBILITY OF CERTAIN WRITTEN RECORDS. Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event, shall be admissible in evidence in proof of said act, transaction, occurrence or event, if the trial judge

shall find that it was made in the regular course of any business, and that it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence or event, or within a reasonable time thereafter. All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but they shall not affect its admissibility. The term business shall include business, profession, occupation and calling of every kind."

Ontario Contributory Negligence Act, Chapter 32, Laws of Ontario (1924), reads as follows:

"3. In any action or counterclaim for damages hereafter brought, which is founded upon fault or negligence, if a plea of contributory fault or negligence shall be found to have been established, the jury, or the judge in an action tried without a jury, shall find:

"*First*. The entire amount of damages to which the plaintiff would have been entitled had there been no such contributory fault or neglect;

"*Secondly*: The degree in which each party was in fault and the manner in which the amount of damages found should be apportioned so that the plaintiff shall have judgment only for so much thereof as is proportionate to the degree of fault imputable to the defendant.

"4. Where the judge or jury finds that it is not, upon the evidence, practicable to determine the respective degrees of fault the defendant shall be liable for one-half the damages sustained."

Rule 514, American Law Institute Code of Evidence (Temporary Pamphlet Edition, 1942), reads as follows:

"BUSINESS ENTRIES AND THE LIKE.

"(1) A writing offered as a memorandum or record of an act, event or condition is admissible as tending to prove the occurrence of the act or event or the existence of the condition if the judge finds that it was made in the regular course of a business and that it was the regular course of that business for one with personal knowledge of such an act, event or condition to make such memorandum or record or to transmit information thereof to be included in such a memorandum or record, and for the memorandum or record to be made at or about the time of the act, event or condition or within a reasonable time thereafter.

"(2) Evidence of the absence of a memorandum or record of an asserted act, event or condition from the memoranda or records of a business is admissible as tending to prove the non-occurrence of the act or event or the non-existence of the condition in that business, if the judge finds that it was the regular course of that business to make such memoranda of all such acts, events, or conditions at the time thereof or within a reasonable time thereafter, and to preserve them.

"(3) The word business as used in Paragraphs (1) and (2) includes every kind of occupation and regular organized activity, whether conducted for profit or not.

Comment:

"This Rule is based upon the Act recommended by the Commonwealth Fund Committee, which has been enacted by Congress and has been adopted substantially verbatim in New York and with some

modifications in a few other states. The Rule differs from the Commonwealth Act in a few particulars: First, it applies not only to acts and events but also to conditions. Second, it includes as a business, every kind of institution, and makes it clear that conduct for profit is not essential to a business. Third, it clearly provides that the person having knowledge of the act, event or condition, either must make the memorandum or must in the course of the business transmit the information for inclusion in the memorandum. The New York Statute, which adopted the Commonwealth proposal, contains no provision requiring personal knowledge by one acting in the regular course of business, but the New York Court of Appeals interpreted it as if it had contained such a provision. In *Johnson v. Latz*, 253 N. Y. 124, 170 N. E. 517, a policeman, who in the regular performance of his duties, investigated an accident which he had not witnessed, made a report thereon based upon statements made to him by persons who claimed to have seen the accident. The report was made in the regular course of the policeman's business, but it was no part of the business of the witnesses of the event either to make the report or to transmit the information for inclusion in a report. The court held the report inadmissible. The decision has been severely criticized on the ground that the statute, like the Commonwealth proposal, requires only that the report be made in the regular course of business, and expressly stipulates that lack of personal knowledge by the writer shall not cause its exclusion but shall affect only its evidential weight. This criticism will lose much of its force if Rules 503 and 529 are accepted, for if the declarant who perceived the event is unavailable, evidence of his statement is admissible under those Rules, if he is available it will work no hardship to require the pro-

ponent to call him. It must be noted, however, that neither this requirement that one with personal knowledge make the memorandum or transmit the information in the regular course of business, nor any other requirement necessitates either any showing or finding as to the interest or lack of interest or motives of the transmitter of the information or of the entrant or recorder, or the calling of any specified persons as witnesses. The judge must make the preliminary findings from admissible evidence; but any witness acquainted with the regular course of the business may testify concerning it. All the judge need find as to the particular writing is that it was made in the regular course of a business; in addition he must find that the regular course of that business complied with requisites of the Rule; only these and nothing more. All common law qualifications and restrictions are abolished. He need make no formal finding; his ruling admitting the writing carries in it the finding of the facts to support it. Fourth, the Rule makes evidence of absence of a memorandum receivable to show the non-occurrence of an act or event or the non-existence of a condition.

"In many cases it would be possible to lay a foundation which would make the entries admissible under Rule 503; but under the present Rule neither personal knowledge of the entrant nor his unavailability need be shown.

"The evidence is admissible wherever relevant. None of the restrictions of the common law *shop-book* rule is applicable."

Supreme Court of the United States**OCTOBER TERM 1942****No. 300**

HOWARD S. PALMER, HENRY B. SAWYER and JAMES LEE
LOOMIS, as Trustees for The New York, New Haven
and Hartford Railroad Company,

Petitioners,

against

HOWARD F. HOFFMAN, individually and as Administrator
of the goods, chattels and credits which were of Inez
Hoffman, also known as Inez T. Spraker Hoffman,
deceased;

Respondent.

**BRIEF FOR RESPONDENT IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

✓ WILLIAM PAUL ALLEN,
Counsel for Respondent.

BENJAMIN DIAMOND,
of Counsel.

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Supreme Court of the United States

OCTOBER TERM 1942

No.

**HOWARD S. PALMER, HENRY B. SAWYER and JAMES LEE
LOOMIS, as Trustees for The New York, New Haven
and Hartford Railroad Company,**

Petitioners,

against

**HOWARD F. HOFFMAN, individually and as Administrator
of the goods, chattels and credits which were of Inez
Hoffman, also known as Inez T. Spraker Hoffman,
deceased,**

Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR CERTIORARI

Preliminary Statement

The grounds urged for the granting of this writ relate merely to rulings on two points of evidence and to a ruling on a request to charge in a case where the petitioners conceded in their brief in the Circuit Court of Appeals that the evidence presented a jury question which the trial judge properly refused to disturb on the motion to set aside the verdict.

The case does not present any question which this Court is accustomed to review by certiorari. No difference of decisions between circuits on any material point is involved, and the decision of the Circuit Court of Appeals

is not in conflict with the decisions of this Court insofar as they have a bearing upon the question here presented. Neither are there questions of large public importance.

Pleadings and Facts

In its opinion the Circuit Court of Appeals summarized the facts and pleadings as follows (R. 514):

"Appellants, as trustees in reorganization of the New York, New Haven and Hartford Railroad Company, appeal from a judgment, entered upon a jury verdict, awarding \$25,077.35 to the plaintiff in his individual capacity and \$9,000.00 to him as administrator of his wife's estate. The action grew out of an accident which occurred at a grade crossing of the appellant railroad in West Stockbridge, Mass. On December 25, 1940, at about 6:15 P. M., the plaintiff was driving a Ford Coupe, with his wife as a passenger, at this crossing, when the car was struck by a locomotive engine, causing severe and permanent injuries to the plaintiff and the death of his wife. The complaint alleged that the railroad was negligent in failing to ring a bell or blow a whistle while approaching the crossing, and in failing to have a proper headlight; in view of the verdict, no issue is raised as to appellants' liability if the rulings on evidence and the charge to the jury were proper, and the alleged errors pertain exclusively to these matters."

The plaintiff in the first cause of action seeks damages for personal injuries to himself, under the General Laws of Massachusetts, Chapter 160, §§ 138 and 140, and Chapter 231, § 85 (R. 4-9, Appendix, pp. 17, 18), and in the second cause of action seeks damages under the common law (R. 9-12). The plaintiff, as administrator, in the third cause of action seeks damages for the death of his wife, under the same statutes and Chapter 229, § 3 (R. 12-15, Appendix, p. 18), and in the fourth cause of action seeks damages for her death under the common law (R. 15). The

allegations as to the statutes are admitted in the answer (R. 20, 23).

As a third separate answer and defense, the defendants allege Chapter 160, § 232 of the Massachusetts Laws (R. 30, 31, Appendix, p. 17).

The issues as to negligence submitted by the court to the jury were whether a bell was rung, whether a whistle was blown and whether the train had a light on its front (R. 426).

After the verdict was rendered, the court denied all motions made by the defendants' counsel at the close of plaintiff's case and at the close of the entire case, upon which decision had been reserved, and also denied all motions to set aside the verdict (R. 442).

The Errors Claimed

1. A statement of defendants' deceased engineer (Defts.' Ex. J for Iden., R. 496-499) was offered in evidence under 28 U. S. C. A., § 695, and upon objection was excluded (R. 421). The Circuit Court of Appeals sustained this ruling (R. 535, 536) and error is claimed.

2. On cross-examination of plaintiff's witness, Laurence Bona, defendants' counsel called for a statement of the witness given to plaintiff's attorneys (R. 125). Upon being advised by the trial judge that if he looked at the statement the opposing side might offer it in evidence, counsel announced he did not want the "pesky" thing (R. 125, 253). The Circuit Court of Appeals refused to reverse on this ruling and error is claimed (R. 550).

3. The court charged that defendants had the burden of proving contributory negligence (R. 428), and defendants excepted (R. 437). They then requested the court to charge (16th request, R. 488): "In the personal injury action plaintiff has the burden of proving freedom from contributory negligence." To the refusal to grant this

request, defendants excepted (R. 437). They now claim error in the sustaining of these rulings by the Circuit Court of Appeals.

Petitioners assert that these rulings on the evidence and the charge present questions upon which this Court should grant to them a writ of certiorari.

ARGUMENT

POINT I

The exclusion of the statement of the deceased engineer was not erroneous and raises no important question of federal law which has not been determined by this Court and which is in conflict with the decisions of this Court insofar as they have a bearing on the question here presented.

The defendants offered in evidence (R. 421) a statement of the engineer who was driving the engine at the time of the accident (Defendants' Exhibit J for Ident., R. 496-499) and who had since died (R. 271). The engineer was riding on the left side of the engine as it was moving and did not see the accident or know of it until the fireman called it to his attention (R. 333). The statement, taken two days after the accident in question and answer form, represents a stenographic record of an interview between the engineer and an assistant superintendent of the railroad, at which were present two other employees of the railroad and a Mr. Christie of the Massachusetts Public Service Commission (R. 496, 514). The offer of this statement was in the following language (R. 421):

"Mr. Brumley: The defendants offer in evidence the statement of the engineer, who the proof indicates is now dead, a statement taken in the regular course of business, the defendant claims, after the accident happened.

The statement was signed by the engineer, and is marked for identification as Exhibit "J, under Section 695 U. S. C. A. 28.

The defendants offer the proof also that this statement was signed in the regular course of any (sic) business and that it was the regular course of such business to make such statement."

The statement is headed "Investigation in connection with engine 438 being struck by an automobile while passing over Elkey-Buckley Public Highway Crossing" (R. 496). This heading clearly indicates that this was an "investigation" involving the conduct of the engineer himself.

In sustaining the exclusion of this statement Circuit Judge Frank, with whom Circuit Judge Swan concurred, after reviewing at length the common law rule and the history and application of § 695, said (R. 535-536):

"With all that in mind, we construe the statute as not making admissible the engineer's statement which, by its very nature, is dripping with motivations to misrepresent. Accordingly, *we decide this and no more*:

The statute does not permit the introduction in evidence of a hearsay statement in the form of a written memorandum or report concerning an accident, if the statement was prepared after the accident has occurred, where the person who makes the memorandum or report knows at the time of making it that he is very likely, in a probable lawsuit relating to that accident, to be charged with wrongdoing as a participant in the accident, so that he is almost certain, when making the memorandum or report, to be sharply affected by a desire to exculpate himself and to relieve himself or his employer of liability."

And again (R. 541):

"But our decision here raises no such problem; we are not leaving the extent of the disqualifying motive under § 695 at large or entrusting discretion with respect to it to the trial judge; for, as we have said, we decide merely this: The statute does not render ad-

missible a hearsay statement made by an employee under standing orders from his employer to make reports of accidents in which the employee is a participant, where the primary purpose of the employer, obvious from the circumstances, in ordering those reports is to use them in litigation involving those accidents."

In the petition, certain phrases, clauses and sentences of the majority opinion are referred to. These do not completely nor adequately reflect the logic and reasoning leading to the conclusion above quoted.

The majority opinion clearly shows that the statement would be excluded under the common law rule (R. 515-522), citing cases from various jurisdictions, including its own prior holdings (R. 518) and quoting from Wigmore (R. 520). From this analysis of the common law rule, the majority concluded (R. 521):

"It is clear, then, that the words 'regular course of business', as used in the decisions, have always included the concept that the circumstances must be such as to safeguard against any crude bias on the part of persons making the records or supplying the information and against any great likelihood that the records may have been fabricated by interested persons for the primary purpose of use in litigation which is in prospect at the time. The mere fact that such entries were made with a view to perpetuating evidence is not sufficient to show such bias as to exclude them. But it is beyond question that a requirement in a business that reports should regularly be made which, by their very nature, are highly likely to be biased, did not bring such reports within the meaning of the words of art, 'regular course of business'. That the defendant railroad here had a regulation requiring its employees, when they were the actors in accidents, regularly to make reports of such accidents for use in probable litigation, did not suffice to include such reports within the 'regular course of business', as those words have always been understood by lawyers and judges. For the 'regularity' which justifies the exception is the kind which tends to 'counteract the possible temptation to mis-statements', as Wigmore has noted.

It follows that the phrase 'regular course of business' never covered a regular practice of making records with the purpose of supplying evidence in a highly probable lawsuit, when those records are made by persons with every 'possible temptation to mis-statements'. We have found no case holding or even suggesting that, absent a statute changing the common law rule, such a statement as the engineer's is admissible, loaded as it is with motives to misrepresent the facts."

The majority opinion then considers the question of admissibility of the statement under § 695 (R. 522-545): Commenting on the language of this section, Judge Frank says (R. 523):

"The words, 'regular course of business', twice employed in the legislation, are not colloquial words but are words of art, with a long history, and, as we have observed, often theretofore judicially interpreted. Consequently, they should be given that settled meaning when incorporated in a statute, absent a contrary legislative intention clearly expressed in the statute or in its legislative history."

After referring to a number of decisions, some from this Court, that words often obtain a fixed meaning through judicial interpretation, Judge Frank says (R. 525):

"And so with 'regular course of business' as applied to records or memoranda in an evidence statute. To a layman, the words might seem to mean any record or paper prepared by an employee in accordance with a rule established in that business by his employer. But according to the jargon of lawyers and judges those words, in discussions of evidence, have always meant writings made in such a way as to afford some safeguards against the existence of any exceptionally strong bias or powerful motive to misrepresent."

While it is true that when there is no ambiguity, there is no room for construction of a statute, it is also true that

words must be given the meaning acquired by usage and interpretation and that all statutes must be construed to carry out the intent of the law enacting body.

This Court, in *Ozawa v. United States*, 260 U. S. 178, 194, said:

"It is the duty of this Court to give effect to the intent of Congress. Primarily this intent is ascertained by giving words their natural significance, but if this leads to an unreasonable result plainly at variance with the policy of the legislation as a whole, we must examine the matter further. We may then look to the reason of the enactment and inquire into its antecedent history and give it effect in accordance with its design and purpose, sacrificing, if necessary, the literal meaning in order that the purpose may not fail."

Reports of legislative committees may be consulted as an aid to ascertain the intent of Congress in enacting a statute.

McLean v. United States, 226 U. S. 374.

Church of the Holy Trinity v. United States, 143 U. S. 457.

Judge Frank then refers to the "Model Act" (from which § 695 is copied) sponsored by the Legal Research Committee of the Commonwealth Fund and to Section 374a of the Civil Practice Act of New York, enacted in 1928, and various decisions thereunder (R. 525-529), and says (R. 529):

"No one knew better than the sponsors of the Model Act—men like Wigmore and Morgan—the traditional significance of 'regular course of business'. *There can be no doubt that their intention was to widen the exception to the hearsay rule relating to such writings. But it is equally without doubt that they did not intend to abolish the exception and to substitute another, by giving that phrase a meaning precisely opposite to that which they well knew was its recognized meaning.* If that had been their intention, they would surely have said so, either in the language of the Act

itself, or in their Report, in order to avoid misleading the lawyers in the legislatures asked to enact that statute. There is nothing whatever in the Report of the Commonwealth Committee even faintly intimating any purpose completely to do away with every one of the traditional safeguards against a motive to misstate in statements made in 'the regular course of business'. Nor is there anything in any subsequent comments of any members of that committee showing that they had any such intention."

In 1936 Congress adopted the Model Act in enacting § 695. Judge Frank quotes from Attorney General Cumming's letter and memorandum, submitting a draft of the bill to Congress (R. 565-570) which showed the limited objective of the act and he then reviews the decisions arising thereafter in the Federal Courts (R. 536, 537). All of these decisions construing § 695 are consistent and based upon the same principle (R. 539):

"There, as in all our other decisions construing and applying § 695, we were careful to ascertain that the 'regularity' in the 'regular course of business' was such as to afford some 'reasonable guaranty of accuracy' or something to show an absence of a vigorous motive to misstate.

We are, then, in no way to be understood as initiating restrictive interpretations of the statute or as retracting or modifying the favorable constructions we have given it in our previous decisions. Our decision here is no less liberal than the decisions of other state or federal courts interpreting the Model Act. For, to repeat, we know of no case in any court holding, or even intimating, that such an obviously motivated record as that here before us is admissible under that Act."

Petitioners suggest (Petition p. 9) that a question of Federal law, more important even than that which served as a basis for the granting of a writ in *Sibbach v. Wilson & Co.*, 312 U. S. 1 (1941), involving Federal Rules of Civil Procedure 35 and 37, is here presented. In that case, how-

ever, the incarceration of a plaintiff for violation of a contempt order for failing to submit to a physical examination was involved and such a question was vital to the rights of a citizen under the Constitution. More analogous is the refusal of this Court to grant a writ of certiorari in *Ulm v. Moore-McCormack Lines, Inc.*, 115 F. (2d) 492, rehearing denied 117 F. (2d) 222, and certiorari denied 313 U. S. 567. In that case the question presented was the construction and application of § 695 as interpreted by the Circuit Court of Appeals for the Second Circuit.

The holding of the Circuit Court of Appeals as quoted above (p. 5) limits this decision to the facts presented herein and is in accord with all prior decisions not only of the Circuit Court of Appeals for the Second Circuit, but in other jurisdictions, and with the decisions of this Court insofar as they are applicable to the question involved.

While it is true there is a dissenting opinion by Circuit Judge Clark, suggesting that the majority opinion is opposed to the intent of the statute and contrary to the prior decisions of that Court, it is submitted that Judge Clark's criticism of the conclusion in the majority opinion is not justified and that his holding that the statement was admissible gives to § 695 so broad a construction that a railroad could present its defense by introducing statements taken in what it calls regular course of that business without the necessity of calling any witnesses. Such an application of the statute, of course, could not have been intended.

This decision, therefore, presents no question of Federal law of sufficient importance to warrant certiorari.

POINT II

The decision of the Circuit Court of Appeals that it was harmless error for the trial court to hold that, upon demand for and inspection by defendants' attorney of a statement made by plaintiff's witness, it was admissible in evidence, presents no important question of federal law which has not been, but should be, determined by this Court.

When defendants' counsel, on cross-examination of plaintiff's witness Laurence Bona, demanded the production of the statement given by the witness to plaintiff's attorney, the court advised him of the rule in the district that such production and inspection would permit the plaintiff to offer the statement in evidence (R. 125), and later state: "That is the rule followed by the judges in this district" (R. 253).

This rule was enunciated in 1891 by Judge Lacombe in *Edison Electric Light Co. v. United States Electric Lighting Co.*, 45 Fed. 55 (C. C. A. 2), and followed in *McCarthy v. Palmer*, 29 Fed. Supp. 585 (E. D. N. Y.), affirmed on other grounds in 113 F. (2d) 721.

The Circuit Court of Appeals disapproves of this rule in the following language (R. 549):

"At any rate, the old 'fixed principle' of keeping the opponent in the dark as to the tenor of the evidence in one's possession is now out of date. The appendant rule here in question is equally so. It is as anachronistic as the buttons on the sleeve of a man's coat; but such a legal rule is more important than coat-sleeve buttons. As it cannot be reconciled with the liberality as to depositions and discovery contained in the new Rules, we reject it."

The majority, however, refused to reverse for the reasons given as follows (R. 550):

"Nevertheless, we do not reverse here for error in the trial judge's ruling, for these reasons: (1) the written statement of the witness could, at most, have been used for purposes of impeachment. As that statement is not in the record before us, it is impossible for us to know whether it contained any remarks contradicting the witness' testimony at the trial so that it would have served for impeaching purposes. If counsel wanted to assign error, he should have asked the trial judge to certify that statement to us, as part of the record on appeal. Since the statement is not before us, the result, if we were to reverse, would be to send the case back on the mere chance that the statement may contain matter which would have led to such an impeachment of the witness as materially to affect the jury's verdict. A verdict should not be so lightly disturbed. (2) Moreover, we cannot say that the trial judge or appellants' counsel was unreasonable in relying on Judge Lacombe's decision in the *Edison Electric* case. (Certainly appellants' counsel was not surprised, since it happens that he had, on behalf of the same clients he represents here, successfully persuaded the judge to render the decision in *McCarthy v. Palmer, supra*). In the circumstances, it would be unwise to overturn a verdict because of the erroneous ruling on this point."

In the dissenting opinion, Circuit Judge Clark does not consider whether the error was reversible or harmless (R. 561).

Although the majority opinion indicates that the trial judge should have dealt with the request as if it had arisen under F. R. C. P. Rule 26(b), and the petitioners claim that such statement by the Court is ground for the granting of this writ, the only question presented was whether plaintiff's counsel could offer the paper in evidence if defendants' counsel looked at it. The Circuit Court of Appeals having rejected the old rule (the only question involved), the fact that it referred to other rules of procedure in its opinion does not present a question of Federal law which should now be reviewed by this Court.

POINT III

The decision of the Circuit Court of Appeals that the burden of proving contributory negligence was on the defendants, is not in conflict with decisions in the First and Eighth Circuits, is not erroneous, and does not present an important question of federal law which should be determined by this Court.

In sustaining the rulings of the trial court, and in holding that the burden of proof of contributory negligence was on the defendants, the court was unanimous. It said (R. 552):

"The only remaining issue is whether the judge was correct in charging that the burden of proving contributory negligence was on the defendant. In so charging, he was following Federal Rule of Civil Procedure 8(c). It is argued that we should disregard that Rule because burden of proof is a matter of 'substance', and hence cannot be altered by court rule. There is no necessity here of considering the argument. For if we were to reject the Rule, we would then turn to the decisions of the New York courts including those relating to conflict of laws. *Erie R. Co. v. Tompkins*, 304 U. S. 64; *Klaxon v. Stentor*, 313 U. S. 487. While, with respect to intra-mural transactions, New York courts hold that the burden of proof is on the plaintiff, in a case such as this, they would apply, as a matter of conflict of laws; the Massachusetts law. *Fitzpatrick v. International Ry. Co.*, 252 N. Y. 127. And it happens that the Massachusetts rule coincides with Rule 8(c). See General Laws of Massachusetts, § 85, c. 231."

It is difficult to understand the petitioner's position regarding this part of the decision. On page 14 the petition reads:

"The decision of the Circuit Court of Appeals is to the effect that because of Rule 8 (c) (set out in Appendix, *infra*, pp. 19-20), or because of the decisions of the

New York courts, including those relating to conflict of laws, the trial court was correct in charging that the burden of proving contributory negligence was on the defendants (R. 552)."

The petition then continues:

"Defendants urge that Rule 8 (c) has no application as it relates to pleading and not to proof, and as federal courts treat burden of proof as a matter of substance which cannot be altered by court rule."

But on page 15 the petition reads:

"The escape method of treatment in the majority opinion (admitted in note 65, R. 552) is not sound. This case involves consideration both of Rule 8 (c) and of New York law. To reach what we contend was a wrong result, the opinion refused to pass upon Rule 8 (c) and misinterprets the New York law."

And later on the same page:

"In not definitely holding that the trial court should have been governed by the conflict of laws rule of New York, which treats burden of proof as procedural, the decision is again in conflict with *Sampson v. Channel*, supra."

Whether the petitioners claim the court applied Rule 8(c) or did not apply it, is uncertain. It would seem, however, from a reading of the opinion that the Circuit Court of Appeals held the charge correct upon the ground that the New York courts in a case of this character, would apply as a matter of conflict of law, the Massachusetts law (*Fitzpatrick v. International Ry. Co.*, 252 N. Y. 127). It happened that the Massachusetts law coincided with Rule 8(c) (R. 552).

This holding is not in conflict with *Sampson v. Channell*, 110 F. (2d) 754 (C. C. A. 1, 1940), certiorari denied 310 U. S. 650, nor with *Fort Dodge Hotel Co. v. Bartelt*, 119 F. (2d) 253 (C. C. A. 8, 1941). In the *Sampson* case the court applied the conflict of laws rule of Massachusetts (as con-

ceded in the petition, p. 15). In the *Fort Dodge Hotel Co.* case, the court applied the law of Iowa, where the accident occurred and where the action was tried. The same principle of conflict of law was followed in *Boyle v. Ward*, 125 F. (2d) 672 (C. C. A. 3, 1942).

In *Sampson v. Channell*, 110 F. (2d) 754, the court after reviewing the principle of conflict of laws in sister states, said (p. 760):

"There is no doubt that in this situation the state courts of New York would have applied the same rule of conflict of laws, and would have looked to the *lex loci delicti*. *Fitzpatrick v. International Ry. Co.*, 252 N. Y. 127, 169 N. E. 112, 68 A. L. R. 801."

The holdings in *Wright v. Palmison*, 237 App. Div. 22, and *Clark v. Harnischfeger*, 238 App. Div. 493, in no way relate to or affect the decision in the *Fitzpatrick* case.

The petition states the question involved as follows (p. 17):

"We have stated the main question to be, whether in diversity of citizenship cases the federal courts must follow the conflict of laws rules as to burden of proof of contributory negligence prevailing in the states in which they sit, notwithstanding Federal Rule of Civil Procedure 8 (c)."

That question was unanimously determined by the Circuit Court of Appeals in holding under the conflict of law rule of New York the Massachusetts law applied. This holding is in accord with the decisions of this Court that in diversity of citizenship cases the conflict of law rule in the state where the court sits, shall control.

Erie Railroad Co. v. Tompkins, 304 U. S. 64.

Klaxon v. Stentor Manufacturing Co., 313 U. S. 487.

Griffin v. McCoach, 313 U. S. 498.

Petitioners, however, seek to introduce subsidiary questions (Petition, p. 17) which were not determined in the

court below and which were not necessary for determination in reaching the conclusion on the issues of burden of proof.

We submit, however, that inasmuch as there is now no conflict between the circuits as to burden of proof of contributory negligence in cases arising because of diversity of citizenship, there is no occasion for this Court to consider this question on this record, simply because the Circuit Court of Appeals failed to express an opinion as to Rule 8 (c).

CONCLUSION

It is respectfully submitted that the issuance of a writ of certiorari should be denied.

WILLIAM PAUL ALLEN,
Counsel for Respondent.

BENJAMIN DIAMOND,
of Counsel,

APPENDIX

Additional Statutes Involved

Chapter 160, Section 138 of the General Laws of Massachusetts, Tercentenary Edition, 1932, reads as follows:

"Every railroad corporation shall cause a bell of at least 35 lbs. in weight, and a steam whistle to be placed on each locomotive engine passing upon its railroad; and such bell shall be rung or at least three separate and distinct blasts of such whistle sounded at the distance of at least 80 rods from the place where the railroad crosses upon the same level with any public way or travelled place over which a signboard is required to be maintained as provided in sections 140 and 141; and such bell shall be rung or such whistle sounded continuously or alternately until the engine has crossed such way or traveled place. This section shall not affect the authority conferred upon the department by the following section."

Chapter 160, Section 232 of the General Laws of Massachusetts, Tercentenary Edition, 1932, reads as follows:

"If a person is injured in his person or property by collision with the engines or cars of rail-borne motor cars of a railroad corporation at a crossing such as is described in section one hundred and thirty-eight, and it appears that the corporation neglected to give the signals required by said section or to give signals by such means or in such manner as may be prescribed by orders of the department, and that such neglect contributed to the injury, the corporation shall be liable for all damages caused by the collision, or to a fine recoverable by indictment as provided in section three of chapter two hundred and twenty-nine, or, if the life of a person so injured is lost, to damages recoverable in tort, as provided in said section three, unless it is shown that in addition to a mere want of ordinary care, the person injured or the person who had charge of his person or property was, at the time of the collision, guilty of gross or wilful negligence, or was acting in violation of the law, and that such gross or wilful negligence or unlawful act contributed to the injury."

Chapter 229, Section 3 of the General Laws of Massachusetts, Tercentenary Edition, 1932, reads as follows:

"If a corporation operating a railroad, street railway or electric railroad, by reason of its negligence or of the unfitness or negligence of its agents or servants while engaged in its business causes the death of a passenger, or of a person in the exercise of due care who is not a passenger or in the employment of such corporation, it shall be punished by a fine of not less than five hundred nor more than ten thousand dollars, be recovered by an indictment prosecuted within one year after the time of the injury which caused the death, which shall be paid to the executor or administrator and distributed as provided in section one; but a corporation which operates a railroad shall not be so liable for the death of a person while walking or being upon its railroad contrary to law or to the reasonable rules and regulations of the corporation and one which operates an electric railroad shall not be so liable for the death of a person while so walking or being on that part of its railroad not within the limits of a highway. Such corporation shall also be liable in damages in the sum of not less than five hundred nor more than ten thousand dollars, to be assessed with reference to the degree of culpability of the corporation or of its servants or agents which shall be recovered in an action of tort, begun within one year after the injury which caused the death, by the executor or administrator of the deceased and distributed as provided in section one."

Chapter 231, Section 85 of the General Laws of Massachusetts, Tercentenary Edition, 1932, reads as follows:

"In all actions, civil or criminal, to recover damages for injuries to the person or property or for causing the death of a person, the person injured or killed shall be presumed to have been in the exercise of due care and contributory negligence on his part shall be an affirmative defense to be set up in the answer and proved by the defendant." •

Supreme Court of the United States

OCTOBER TERM 1912

No. 300

HOWARD S. PALMER, HENRY B. SAWYER and JAMES LEE
LOOMIS, as Trustees for The New York, New Haven and
Hartford Railroad Company,

Petitioners,

against

HOWARD F. HOFFMAN, individually and as Administrator
of the goods, chattels and credits which were of Inez
Hoffman, also known as Inez T. Spraker Hoffman, deceased,

Respondent.

BRIEF FOR RESPONDENT

WILLIAM PAUL ALLEN,
Counsel for Respondent.

BENJAMIN DIAMOND,
of Counsel.

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Supreme Court of the United States

OCTOBER TERM 1942

No. 300

HOWARD S. PALMER, HENRY B. SAWYER and JAMES LEE LOOMIS, as Trustees for The New York, New Haven and Hartford Railroad Company,

Petitioners,

against

HOWARD F. HOFFMAN, individually and as Administrator of the goods, chattels and credits which were of Inez Hoffman, also known as Inez T. Spraker Hoffman, deceased,

Respondent.

BRIEF FOR RESPONDENT

I

Opinions of the Courts Below

The District Court delivered no opinion.

The majority and minority opinions of the Circuit Court of Appeals for the Second Circuit are reported in 129 F. (2d) 976, and will be found on pages 441-489.

II

Statement of the Case

In its opinion the Circuit Court of Appeals summarized the facts and pleadings as follows (R. 441, 442):

"Appellants, as trustees in reorganization of the New York, New Haven and Hartford Railroad Company, appeal from a judgment, entered upon a jury verdict, awarding \$25,077.35 to the plaintiff in his individual capacity and \$9,000.00 to him as administrator of his wife's estate. The action grew out of an accident which occurred at a grade crossing of the appellant railroad in West Stockbridge, Mass. On December 25, 1940, at about 6:15 P. M., the plaintiff was driving a Ford Coupe, with his wife as a passenger, at this crossing, when the car was struck by a locomotive engine, causing severe and permanent injuries to the plaintiff and the death of his wife. The complaint alleged that the railroad was negligent in failing to ring a bell or blow a whistle while approaching the crossing, and in failing to have a proper headlight; in view of the verdict, no issue is raised as to appellants' liability if the rulings on evidence and the charge to the jury were proper, and the alleged errors pertain exclusively to these matters."

The plaintiff in the first cause of action seeks damages for personal injuries to himself, under the General Laws of Massachusetts, Chapter 160, Sections 138 and 140, and Chapter 231, Section 85 (R. 3-7; Appendix, pp. 35-36), and in the second cause of action seeks damages under the common law (R. 7-9). The plaintiff, as administrator, in the third cause of action seeks damages for the death of his wife, under the same statutes and Chapter 229, Section 3 (R. 9-11; Appendix, p. 36), and in the fourth cause of action seeks damages for her death under the common law (R. 11). The allegations as to the statutes are admitted in the answer (R. 15, 18).

As a third separate answer and defense the defendants allege Chapter 160, Section 232 of the Massachusetts Laws (R. 23; Appendix, p. 35).

The issues as to negligence submitted by the court to the jury were whether a bell was rung, whether a whistle was blown, and whether a light was burning on the front of the train (R. 383, 385, 386).

At the trial a statement of petitioners' engineer, who had died subsequent to the accident (R. 239), was offered in evidence under 28 U. S. C. A., Section 695 (Act of June 20, 1936, Chap. 640, Sec. 1, 49 Stat. 1561; Petitioners' Exhibit J for Identification, R. 431-435). Respondent's objection to its introduction in evidence was sustained by the trial court (R. 381, 382). The Circuit Court of Appeals sustained this ruling (R. 461, 469) and error is claimed.

This statement was offered in evidence in the following language (R. 381):

"Mr. Brumley: The defendants offer in evidence the statement of the engineer, who the proof indicates is now dead, a statement taken in the regular course of business, the defendant claims, after the accident happened.

"The statement was signed by the engineer, and is marked for identification as Exhibit J under Section 695 U. S. C. A. 28.

"The defendants offer the proof also that this statement was signed in the regular course of any (sic) business and that it was the regular course of such business to make such statement."

No claim was made by the petitioners that it was a report of a public official or was admissible as part of such report and no such claim was made in the petitioners' brief before the Circuit Court of Appeals (R. 466, 467).

Likewise, no claim was made that it was admissible under any statute of Massachusetts relating to declarations of deceased persons as now intimated in petitioners' brief (pp. 18-21).

The statement is headed "Investigation in connection with Engine 438 being struck by an automobile while passing over Elkey-Buckley Public Highway Crossing, Mileage 8.42 on State Line Branch, West Stockbridge, Massachusetts" (R. 431). This heading clearly indicates that it was an "investigation" involving the conduct of the engineer himself.

The engineer was riding on the left side of the engine as it was moving with tank forward, and did not see the car approaching from the right side or the collision or know of it until the fireman called it to his attention. His statement was taken two days after the accident in question and answer form and represents a stenographic record of an interview between the engineer and the assistant superintendent of the railroad, at which were present two other employees of the railroad and a Mr. W. E. Christie of the Massachusetts Public Utilities Commission.

At the trial petitioners' counsel, on cross-examination of respondent's witness, Laurence Bona, called for a statement of the witness given to respondent's attorney (R. 107). Upon being advised by the trial judge that under the rule followed by the judges in the district, if he looked at the statement, the opposing side might offer it in evidence, petitioners' counsel declined to inspect the statement (R. 107, 224). The Circuit Court of Appeals refused to reverse on this ruling and error is claimed (R. 474).

The trial court charged that the petitioners had the burden of proving contributory negligence (R. 387). Counsel then requested the court to charge (16th request, R. 403): "In the personal injury action plaintiff has the burden of proving freedom from contributory negligence." To the charge and to the refusal to grant this request petitioners excepted (R. 394). The Circuit Court of Appeals unanimously held that the charge on burden of proof was correct (R. 475, 483) and error is claimed.

III

Questions Presented

(1) Whether the Circuit Court of Appeals properly sustained the trial court's exclusion of the statement of petitioners' deceased engineer offered under 28 U. S. C. A. § 695.

(2) Whether the Circuit Court of Appeals properly held that the denial of petitioners' demand to inspect, without condition attached, a statement made by respondent's witness, constituted reversible error.

(3) Whether the Circuit Court of Appeals properly sustained the trial court's charge that the burden of proof as to contributory negligence was on the petitioners in a diversity of citizenship case under the Conflict of Laws Rule of New York.

IV

Summary of the Argument

POINT I

The statement of petitioners' deceased engineer, Exhibit J for Identification (R. 431-425), was properly excluded.

A. It is inadmissible at common law.

B. It is inadmissible under 28 U. S. C. A. § 695 (Act of June 20, 1936, Chap. 640, Sec. 1, 49 Stat. 1561).

C. The decision is in accord with the authorities.

POINT II

The holding of the Circuit Court of Appeals that the trial court's denial of petitioner's demand to inspect, without conditions attached, a statement made by respondent's witness, did not constitute reversible error.

POINT III

In the personal injury action the petitioners had the burden of proving contributory negligence.

ARGUMENT**POINT I**

The statement of petitioners' deceased engineer, Exhibit J for Identification (R. 431-435) was properly excluded.

In its opinion, written by Judge Frank and concurred in by Judge Swan, the Circuit Court of Appeals held:

"The engineer's report would clearly be excluded under the common law rule" (R. 442).

"The statute does not render admissible a hearsay statement made by an employee under standing orders from his employer to make reports of accidents in which the employee is a participant, where the primary purpose of the employer, obvious from the circumstances, in ordering these reports is to use them in litigation involving those accidents" (R. 465).

In a dissenting opinion Judge Clark states that he is much disturbed by the interpretation of the statute as it seems to be directly opposed to the intent of the statute as shown by its plain terms (R. 476).

A**It is inadmissible at common law**

Under no principle of common law is this statement admissible as it is hearsay and a self-serving declaration and does not come within any recognized exception to the hearsay rule. It is not admissible under the shop-book rule, or the extension of that rule relating to entries made in the regular course of business.

Recognizing the necessity for proving entries in books of account, the courts formulated the shop-book rule to assist small traders who kept no clerks to prove their accounts.

With the growth of modern commercial business the courts recognized the need for liberalization of this rule and permitted, under the theory of entries made in the regular course of business, various bookkeeping entries of large business organizations employing a substantial number of clerks, each of whom performed some small routine duty, and no one of whom had personal knowledge of the transaction as a whole.

Northern Pacific Ry. Co. v. Keyes, 91 Fed. 47 (C. C., D. N. D., 1898).

Landay v. United States, 108 F. (2d) 698 (C. C. A. 6, 1939), cert. den. 309 U. S. 681 (1940).

Rowland v. St. Louis & S. F. R. R. Co., 244 U. S. 106 (1917).

Such entries, however, were surrounded with a guarantee of trustworthiness and were without motive to misrepresent. This principle of trustworthiness and lack of motive to misrepresent is recognized by Wigmore throughout his chapter on "Exceptions to the Hearsay Rule" (Wigmore, 3d Ed., Vol. 5, Sec. 1422; Appendix, p. 40).

This Court recognized this principle and admitted in evidence records of public service corporations where the safe conduct of important public utilities depended on the care and accuracy in which the reports in question were kept and where the method of keeping books was constantly open to supervision and inspection and where "the guaranty of their truth is sufficiently established by the scrutiny to which they are always subject."

Consolidated Gas Co. v. Newton, 267 Fed. 231, 242 (D. C. S. D. N. Y., 1920), aff'd 258 U. S. 165 (1922).

Kings County Lighting Co. v. Nixon, 268 Fed. 143, 146 (D. C. S. D. N. Y., 1920), aff'd 258 U. S. 180 (1922).

This statement of the engineer is clearly hearsay and a self-serving declaration and does not meet the requirement of trustworthiness and lack of motive to misrepresent. Similar statements, or reports, of conductors and motormen in charge of common carriers have been held to be inadmissible.

Connor v. Seattle R. & S. Ry. Co., 56 Wash. 310, 105 Pac. 634 (1909).

Bloom v. Union Railroad Co., 165 App. Div. 257 (1914).

North Hudson Ry. Co. v. May, 46 N. J. L. 401, 5A. 276 (1886).

Rickabaugh v. Youngstown Municipal Ry. Co., 55 Ohio App. 431, 9 N. E. (2d) 900 (1936).

As stated by Judge Frank (R. 443), "This motive factor has been stressed in the decisions," which are referred to specifically in the opinion (R. 444-445). The element of trustworthiness, as a foundation of the "regular course of business" exception, has been consistently followed in the Second Circuit in the cases referred to by Judge Frank (R. 445).

This same principle of circumstantial guarantee of trustworthiness involving the absence of a vigorous motive to misrepresent (as stated by Judge Frank, R. 446) applies to practically all the exceptions to the hearsay rule, such as declarations about private boundaries, statements concerning family history, spontaneous declarations and dying declarations.

Wigmore (3rd Ed., 1940), Section 1566 (Appendix, p. 41), declarations concerning boundaries; Section 1438 (Appendix, p. 41), concerning dying declarations; Section 1747 (Appendix, p. 42), concerning spontaneous declarations; Sections 1482, 1484 (Appendix, p. 41), concerning declarations as to family history.

From this analysis of the common law rule the majority conclude (R. 448):

"It is clear, then, that the words 'regular course of business,' as used in the decisions, have always included the concept that the circumstances must be such as to safeguard against any crude bias on the part of persons making the records or supplying the information and against any great likelihood that the records may have been fabricated by interested persons for the primary purpose of use in litigation which is in prospect at the time. The mere fact that such entries were made with a view to perpetuating evidence is not sufficient to show such bias as to exclude them. But it is beyond question that a requirement in a business that reports should regularly be made which, by their very nature, are highly likely to be biased, did not bring such reports within the meaning of the words of art, 'regular course of business'. That the defendant railroad here had a regulation requiring its employees, when they were the actors in accidents, regularly to make reports of such accidents for use in probable litigations, did not suffice to include such reports within the 'regular course of business', as those words have always been understood by lawyers and judges. For the 'regularity' which justifies the exception is the kind which tends to 'counteract the possible temptation to misstatements', as Wigmore has noted. It follows that the phrase 'regular course of business' never covered a regular practice of making records with the purpose of supplying evidence in a highly probable lawsuit, when those records are made by persons with every 'possible temptation to misstatements'. We have found no case holding or even suggesting that, absent a statute changing the common law rule, such a statement as the engineer's is admissible, loaded as it is with motives to misrepresent the facts."

B

It is inadmissible under 28 U. S. C. A., § 695

This section is identical in language with the so-called Model Act (Appendix, p. 37), drafted by a committee ap-

pointed by the Legal Research Committee of the Commonwealth Fund, which reported its findings and recommendations in a volume entitled "The Law of Evidence; Some Proposals for Its Reform," published in 1927 by Yale University Press.

As stated in Chapter 5, entitled "Proof of Business Transactions to Harmonize With Current Business Practice," page 51, the adjudicated cases "reveal the need of inducing the courts to give evidential credit to the books upon which the mercantile and industrial world relies in the conduct of business."

There is nothing in this report that would indicate that the committee in using the words "regular course of business" in the proposed statute had any thought in mind other than the meaning of those words at common law. It is clear, moreover, from this report that the proposed statute contemplated only a simplification in the matter of proving bookkeeping records maintained by mercantile and industrial business (R. 453-455).

This report reviews the history of the shop-book doctrine, and among its findings says (p. 53): "It is too obvious for comment that a rule with such a history, hedged about by so many limitations is absolutely inadequate to meet the demands of litigation involving modern business transactions."

The report then discusses the rule admitting "regular entries in the regular course of business" and points out the insufficiency of this rule for modern business (pp. 53-54), and then reviews the use of these entries to revive or supplement recollection (pp. 54-57). After considering the three propositions involved in the chapter, the report states: "The law, then, if properly presented and understood, furnishes a method by which most business accounts can be proved; by a slight extension all could be proved. But at what an exorbitant cost!" (p. 57). It then sets out "the chain of events in a large business house, showing that scores of persons, many of them unidentifiable, work on

an order from the time it is sold until the customer is billed" (Report, pp. 57-61; R. 454). The report then concludes: "These statements demonstrate how far modern business has departed from the rules which the courts seem to think it should follow; and they make Mr. Wigmore's position on this question well-nigh impregnable" (p. 61, quoting 3 Wigmore, Evidence [1923], sec. 1530).

In commenting on the Model Act, Judge Frank says (R. 454):

"No one knew better than the sponsors of the Model Act—men like Wigmore and Morgan—the traditional significance of 'regular course of business'. *There can be no doubt that their intention was to widen the exception to the hearsay rule relating to such writings. But it is equally without doubt that they did not intend to abolish the exception and to substitute another, by giving that phrase a meaning precisely opposite to that which they well knew was its recognized meaning.* If that had been their intention, they would surely have said so, either in the language of the Act itself or in their Report, in order to avoid misleading the lawyers in the legislatures asked to enact that statute. There is nothing whatever in the Report of the Commonwealth Committee even faintly intimating any purpose completely to do away with every one of the traditional safeguards against a motive to misstate in statements made in 'the regular course of business'. Nor is there anything in any subsequent comments of any members of that committee showing that they had any such intention." (Italics are Judge Frank's.)

While it is true that when there is no ambiguity there is no room for construction of a statute, it is also true that words must be given the meaning required by usage and interpretation and that the statutes must be construed to carry out the intent of the law-enacting body.

This Court, in *Ozawa v. United States*, 260 U. S. 178, 194 (1922), said:

"It is the duty of this Court to give effect to the intent of Congress. Primarily this intent is ascertained by giving the words their natural significance, but if this leads to an unreasonable result plainly at variance with the policy of the legislation as a whole, we must examine the matter further. We may then look to the reason of the enactment and inquire into its antecedent history and give it effect in accordance with its design and purpose, sacrificing, if necessary, the literal meaning in order that the purpose may not fail."

Reports of legislative committees may be consulted as an aid to ascertain the intent of Congress in enacting a statute.

McLean v. United States, 226 U. S. 374 (1912).

Church of the Holy Trinity v. United States, 143 U. S. 457 (1892).

In order to understand the intent of Congress in adopting Section 695, it is proper and necessary to consider the method of its proposal and any reports or debates thereon. The court in its amended opinion (R. 484-488) considers these questions and shows "the limited objective at which Congress was in fact driving" (R. 484). The report of the Senate Judiciary Committee consists entirely of a letter from the Attorney General to the Chairman of the Committee and a memorandum referred to and enclosed with that letter, which are set forth in the opinion (R. 484-488). Apparently there was no extended debate on the bill, either in the House or Senate. It must be assumed, however, that Congress considered the report of the Attorney General and passed this act upon the basis of the reasoning of his recommendation. From his recommendation it is clear that he proposed the bill in order to make uniform in the federal courts the modern rule followed by many federal and state

courts regarding admissibility of business records, and particularly the rule as it theretofore had been applied in the Second Circuit.

Clearly there is no expressed legislative intent in the words of Section 695 that the common law requisite of trustworthiness was intended to be removed. In determining the legislative intent it was quite proper and even necessary for the court to consider the meaning of the words as reflected from the prior use of the same words at common law, and the history of those words as revealed in the decisions, in the report submitting the act and in the discussion in Congress.

There is no doubt that the report of the Commonwealth Fund Committee was considered when Section 695 was passed, and, also, the decisions in states where the so-called Model Act had been previously adopted. The Attorney General, in recommending the bill, informed Congress of similar statutes in other states, including New York. In his report submitting the bill appears the following (74th Congress, 2d Session—report No. 1965, April 24, 1936):

"A draft of a bill is submitted herewith designed to make uniform in the Federal Courts the modern rule now followed generally by the Federal Courts, and many state courts, to which reference has been made. This bill follows language recommended by Wigmore in Wigmore on Evidence, 1934 Supplement, Section 1520, and is almost identical with New York and Maryland statutes on the subject."

Judge Frank holds that the words "regular course of business" twice repeated in the statute should be given the settled meaning observed at common law (R. 450), and, after reviewing at length the history and application of Section 695, says (p. 461):

"With all that in mind, we construe the statute as not making admissible the engineer's statement which, by its very nature, is dripping with motivations to misrepresent. Accordingly, we decide this and no more:

"The statute does not permit the introduction in evidence of a hearsay statement in the form of a written memorandum or report concerning an accident, if the statement was prepared after the accident has occurred, where the person who makes the memorandum or report knows at the time of making it that he is very likely, in a probable lawsuit relating to that accident, to be charged with wrongdoing as a participant in the accident, so that he is almost certain, when making the memorandum or report, to be sharply affected by a desire to exculpate himself and to relieve himself or his employer of liability."

And again (R. 465):

"But our decision here raises no such problem. We are not leaving the extent of the disqualifying motive under § 695 at large or entrusting discretion with respect to it to the trial judge; for, as we have said, we decide merely this: The statute does not render admissible a hearsay statement made by an employee under standing orders from his employer to make reports of accidents in which the employee is a participant, where the primary purpose of the employer, obvious from the circumstances, in ordering those reports is to use them in litigation involving those accidents."

In 1928, New York adopted verbatim the statute proposed by the Committee of the Commonwealth Fund as Section 374a of the Civil Practice Act (Appendix, p. 37). Prior to the passage in 1936 of Section 695, the appellate courts of New York had construed and interpreted this Section 374a.

In *Needle v. New York Railways Corporation*, 227 App. Div. 276 (1929), aff'd 256 N. Y. 616 (1931), a husband and wife sued for personal injuries to the wife due to the alleged negligence of defendant's operation of its trolley car which struck the wife as she was crossing the street. The principal issue was the circumstances under which the accident happened. This was sharply disputed. Plaintiff contended she attempted to cross while the trolley was stopped. De-

fendant claimed the plaintiff crossed in front of the moving car.

Defendant offered in evidence a police blotter containing a report of the accident by a policeman who did not see the accident but based his report upon hearsay statements made to him by third parties, including the motorman of the car, and which contained the statement "Responsibility Pedestrian". Court reversed judgment for defendants. In passing upon the admissibility of the police blotter under Section 374a the court said (p. 278):

"This section was enacted in order to do away with the archaic rules of procedure in relation to book entries. The section, however, does not cover and should not cover the use to which it was here put in permitting in evidence the report of the police blotter. Primarily the urge for this procedural change was the same as that which first produced and limited 'shop book' rule enunciated in the early New York case of *Tosburgh v. Thayer* (12 Johns 461), and which also has produced further extensions of that rule, namely, the reasonable requirements of business men in having admitted in evidence entries of a commercial nature. As enacted this section does not cover commercial entries alone. It is to be noted, however, that in every case where the section applies the fact must be found by the trial judge that the entry 'was made in the regular course of any business . . .'. In the case at bar, to show that this record is inadmissible, it is only necessary to point out that the statements made to the policeman, upon which he based his report, were not made by any person in the regular course of any business, but on the contrary, the report of the policeman was made upon the irresponsible gossip of by-standers and the even more unreliable conclusion of the interested motorman who, instead of being so placed as to be presumed to be without a motive to falsify in helping to make the record, had every reason to give a biased and false report. The police blotter, therefore, was erroneously admitted."

In *Johnson v. Lutz*, 253 N. Y. 124 (1930), plaintiff sued to recover damages for death of her intestate, who was

killed when his motorcycle collided with defendant's truck at a street intersection. A policeman's report of the accident, filed by him at the station house, containing statements from bystanders, was offered in evidence by the defendant under Section 374a of the Civil Practice Act and was excluded. This exclusion was held proper.

The court refers to *Fosburgh v. Thayer*, 12 Johns. 461, decided in 1815, wherein shop books were held to be admissible to prove an account, stating that decision was the basis of law until the passage of 374a.

The court then says (p. 126):

"Under modern conditions the limitations upon the right to use books of account, memoranda or records made in the regular course of business, often resulted in a denial of justice, and usually in annoyance, expense and waste of time and energy. A rule of evidence that was practical a century ago had become obsolete. The situation was appreciated and attention was called to it by the courts and text writers. (Woods Practice Evidence [2d ed.] 377; 3 Wigmore on Evidence [1923], § 1530.)

"The report of the Legal Research Committee of the Commonwealth Fund, published in 1927, by the Yale University Press, under the title 'The Law of Evidence—Some Proposals for Its reform' dealt with the question in chapter 5 under the heading 'Proof of Business Transactions to Harmonize with Current Business Practice'. That report, based upon extensive research, pointed out the confusion existing in decisions in different jurisdictions. It explained and illustrated the great need of a more practical, workable and uniform rule, adapted to modern business conditions and practices. The chapter is devoted to a discussion of the pressing need of a rule of evidence which would 'give evidential credit to the books upon which the mercantile and industrial world relies in the conduct of business.' At the close of the chapter the committee proposed a statute to be enacted in all jurisdictions. In compliance with such proposal the Legislature enacted section 374a of the Civil Practice Act in the very words used by the committee.

It is apparent that the Legislature enacted section 374a to carry out the purpose announced in the report of the committee. That purpose was to secure the enactment of a statute which would afford a more workable rule of evidence in the proof of business transactions under existing business conditions."

Again, at page 128:

"An important consideration leading to the amendment was the fact that in the business world credit is given to records made in the course of business by persons who are engaged in the business upon information given by others engaged in the same business as part of their duty."

At page 129:

"The Legislature has sought by the amendment to make the courts practical. It would be unfortunate not to give the amendment a construction which will enable it to cure the evil complained of and accomplish the purpose for which it was enacted. In construing it we should not, however, permit it to be applied in a case for which it was never intended."

In later cases New York courts have admitted hospital records in evidence as entries made in the regular course of business.

Meiselman v. Crown Heights Hospital, Inc., 285 N. Y. 389, 396 (1941).

People v. Kohlmeier, 284 N. Y. 366, 369 (1940).

Time sheets and books of account were held admissible in *Warner-Quinlan Co. v. Charat*, 143 Misc. 443 (1932); old letters passing between railroad officers and old resolutions from railroad records, in *Harrison v. N. Y. C. Railroad Co.*, 255 App. Div. 183 (1938), and payroll records in *Matter of Booth and Flinn*, 249 App. Div. 893 (1937).

In *People v. Robinson*, 273 N. Y. 438, 446 (1937), notations on checks were held inadmissible. In *Roge v. Valentine*, 280 N. Y. 268, 278 (1939), record cards and check

stubs were held inadmissible. In *Poses v. Travelers Insurance Co.*, 245 App. Div. 304, 307 (1935), an affidavit of a family doctor to the medical examiner was held inadmissible, the court saying: "That section was never intended to cover a situation of this type. Furthermore, the section does not make admissible evidence which is otherwise inadmissible." In these cases the entries were held not to be made in the regular course of business.

Petitioners' Cases

Petitioners claim that the decision is contrary to the intent of the statute (Point I, subdivision B, pp. 12-16). They claim that *The Spica*, 289 Fed. 436 (C. C. A. 2, 1923), recognized the necessity in the case of death, insanity or absence from the jurisdiction, for hearsay proof of the activities of a large business. The extent of such admission of proof is thus stated in that case (p. 443):

"If, then, an entry be offered which is proved as part of a regular system, which is substantially contemporaneous, and concerning which no motive for falsification or probability of negligent error is observed, there exists that reasonable guaranty of trustworthiness which is the second ground of admission of regular entries. Sections 1522-1527. Thus we accept it as a rule, flexible in the reasonable discretion of the court that sees the men concerned in the business and hears evidence as to the necessities of the situation, that no objection, based on the exclusion of hearsay, exists to the admission of an entry made by one person in the regular course of business, recording an oral or written report, made to him by one or more other persons in like regular course, of a transaction lying in the personal knowledge of the latter, if necessity and trustworthiness as above outlined be shown to exist. Section 1530." (Sections refer to Wigmore.)

In *Chesapeake & Ohio Railway Co. v. Stojanowski*, 191 Fed. 720 (C. C. A. 2, 1911), the court held admissible train sheets of a railroad showing the arrival and departure of trains, stating (p. 721):

"The safe operation of the railroad depended upon the accuracy of the train sheets. Every interest demanded that the entries should be accurate and there was every incentive to employees to make them so. No reason is suggested why the operator who observed the movement of the train at a station and telephoned the information to the dispatcher's office or the dispatcher who received and made the entry should have made an error. The train sheet entries were made in the regular course of the operation of the railway and, in our opinion, came within a recognized exception to the hearsay rule."

In *Massachusetts Bonding and Insurance Co. v. Norwich Pharmacal Co.*, 18 F. (2d) 934 (C. C. A. 2, 1927), ordinary bookkeeping records were offered in evidence and the court said (p. 937):

"Records, and records alone, are their adequate repository, and are in practice accepted as accurate upon the faith of the routine itself and of the self-consistency of the contents."

In *Rowland v. St. Louis & S. F. R. R. Co.*, 244 U. S. 106 (1917), the court, in setting aside objections to reports prepared by the railroad in connection with division of expense and income, said (p. 108):

"* * * But it is enough to say that the Railroad adopted the only practicable mode of presenting its results; that it exhibited its work-sheets and data to the appellants, that the returns were made by the employees in the course of their business and that if the appellants had desired to question any of the data they could have called for further verification. It seems to us that technical rules are satisfied and that justice plainly requires this objection to be set aside."

In *Sullivan v. Minneapolis St. Ry. Co.*, 161 Minn. 45 (1924), plaintiff, a passenger, claimed she was injured when defendant's street car made an emergency stop. Defendant had a rule requiring all motormen to make a report of every emergency stop. At the trial his report was of-

ferred in evidence to repel an attack upon his credibility on the theory that such consistent statement was made before he had any motive to falsify. It is true that the court thereafter, in dicta, intimates that such report might have been introduced generally to prove the fact. The report, however, contained only statements which the motorman could give at the trial and which he had given. It contained only his acts and no hearsay declarations or conclusions. Nothing in the court's opinion indicates that it would have admitted a statement such as petitioner's Exhibit J from a person with a motive to falsify and containing hearsay and conclusions.

In *Gelbin v. N. Y., N. H. & H. R. Co.*, 62 F. (2d) 500 (C. C. A. 2, 1933), a record made by an employee of the state department of public works was offered under Section 374a of the New York Civil Practice Act and was admitted in evidence. The court's ruling, however, seems to be based largely upon its decision in *DiCarlo v. United States*, 6 F. (2d) 364, 366, in holding that the record was a prior statement of a witness made before any motive to falsify had arisen and was competent when his veracity as a witness had been challenged.

C

The decision is in accord with the authorities

In addition to the cases heretofore mentioned under A and B it is submitted that all of the decisions dealing with Section 695 have "consistently high-lighted the absence of a powerful motive to misstate as a necessary factor to render admissible memoranda made in the regular course of business" (R, 461).

In *Pressell v. New England Transportation Co.*, 91 F. (2d) 1019 (C. C. A. 2, 1937), which arose under the New York statute before Section 695 became operative, the lower court's decision rejecting a police blotter was sustained under the *Lutz* and *Needle* cases, *supra* (R. 461).

In *Hunter v. Derby Foods, Inc.*, 110 F. (2d) 970, 973 (C. C. A. 2, 1940), a certificate made by a coroner in the course of his official duty was held admissible, the court referring not only to Section 695 but to Section 367 of the Civil Practice Act of New York.

In *Ulm v. Moore-McCormack Lines, Inc.*, 115 F. (2d) 492 (C. C. A. 2, 1941), rehearing denied 117 F. (2d) 222, cert. den. 313 U. S. 567 (1941), a marine hospital record on a form of the U. S. Public Health Service executed in the regular course of duty by the attending physician was held admissible.

In the *Ulm* case (115 F. [2d] 495), Judge Clark says: "The objective, as Wigmore so lucidly explains, was to do away with the technical rulings which excluded records ordinarily used in business transactions when not formally identified by the makers."

In *United States v. Mortimer*, 118 F. (2d) 266 (C. C. A. 2, 1941), a tabulation and charts made by a public accountant from public records was held admissible.

In *Reed v. Order of United Commercial Transportation of America*, 123 F. (2d) 252 (C. C. A. 2, 1941), a hospital record containing the attending doctor's diagnosis of patient's condition was held admissible.

States besides New York have enacted a statute identical with, or similar to, the language in the Model Act.

In 1935, Michigan adopted it in identical language (No. 15, Public Laws of Michigan, 1935; Appendix, p. 38). In *Gile v. Hudnutt*, 279 Mich. 358, 364 (1937), the court was called upon to interpret the act in connection with certain hospital records. Holding that the object of the statute was well stated in *Johnson v. Lutz*, 253 N. Y. 124, and quoting extensively therefrom, the court said:

"The act simply enlarges a rule of evidence and follows the model acts adopted in Maryland, New York and Rhode Island. The act not only provides for books or records kept in commerce, but also in occupations and professions. A full discussion of the act may be found in Vol. 14, Michigan State Bar Journal, 35."

In *Sadjak v. Parker-Wolverine Co.*, 281 Mich. 84, 87 (1937), the court said:

"It is claimed that, as this statement is part of the hospital record, it was admissible under Act No. 15 of the Public Acts of 1935. We discussed the act in *Gile v. Hudnutt*, 279 Mich. 358, 272 N. W. 706, where we stated that the act contained its own limitations. What decedent told the hospital authorities did not refer to any act, transaction, occurrence, or event in the hospital treatment. The portion of the record thus objected to was pure hearsay and of no evidentiary force and inadmissible."

In *Valenti v. Mayer*, 301 Mich. 551, 557 (1942), the court said:

"However, the *Gile* case and *Sadjak v. Parker-Wolverine Co.*, 281 Mich. 84, at page 87, 274 N. W. 719, both hold that the act has its limitations and that the only admissible record is that which refers to acts, transactions, occurrences or events incident to the hospital treatment. Parts which do not are hearsay and not admissible. Therefore, in admitting the hospital record, the trial court should have admitted only those parts having to do with matters within the limitations of the statute. It was error to admit parts of the hospital record which contained only information given by various people as to history of the plaintiff prior to the accident."

The statute of Rhode Island is substantially similar to the Model Act (R. I. General Laws Annotated [1938], Ch. 538, Sec. 1; Appendix, p. 39).

In *Preston v. United Electric Rys. Co.*, 61 R. I. 378, 387 (1938), the court said:

"The eighth exception concerns evidence in the form of a written report, offered by the defendant as coming within the provisions of Public Laws 1928, chapter 1161. Assuming, without deciding, that the report in question was admissible under the terms of said statute, we find that its exclusion was harmless error. The

fact, to help establish which the report was being offered by the defendant, was already in evidence in the case, and was before the jury for their consideration."

Pennsylvania has a Uniform Business Records as Evidence Act (Purdon, Supp. 1942, Tit. 28, Secs. 91a-d; Appendix, p. 39).

In *Freedman v. Mutual Life Insurance Company of New York*, 342 Pa. 404, 412 (1941), the court said, relative to the admission of hospital records:

"The limitations on this exception to the hearsay rule are set forth in *Paxos v. Jarka Corporation*, 314 Pa. 148, 153, 171 A. 468, where we held that such records must satisfy three probative requirements: (1) they must be made contemporaneously with the acts to which they purport to relate; (2) there must have been present at the time no contemplative motive for falsification; (3) they must have been made by a person having knowledge of the facts set forth, or one competent to predicate a medical and scientific opinion on the facts."

And again, at page 414:

"If any doubt exists upon this point it is resolved by the Uniform Business Records as Evidence Act, Section 1, which expressly applies to the records of 'every kind of business, *profession*, occupation, calling, or operation of institutions, whether carried on for profit or not.' (Italics added.) Section 2 provides: 'A record of an act, condition or event shall, in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business at or near the time of the act, condition or event, and if in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission'. The legislature certainly intended thereby an extension of the old 'shop-book' rule, and to make professional records competent documentary evidence un-

der the circumstances set forth. We agree with plaintiff that the Act did not intend to make relevant that which is not relevant, nor to make all business and professional records competent evidence regardless of by whom, in what manner, and for what purpose they were compiled, or offered. We do think, however, that the Act makes competent the records of these physicians as documentary evidence of the matters we have indicated, and that it applies as well to the records of prescriptions prepared by the pharmacist, and to the cardiogram prepared by Dr. Ohlson."

The engineer's statement contains expressions of opinion and conclusions which would have been inadmissible if the engineer was orally examined in court. Although he did not see the accident, he expresses his opinion and conclusion that the automobile struck the train and gives his opinion as to visibility without showing that the conditions and circumstances were practically identical, and expresses his conclusion that he would put the brakes on in any event (R. 434). The document was offered in its entirety. The engineer's statement as to blowing the whistle, ringing the bell and having the headlight on had been testified to by eleven witnesses for the defense, including the train crew and residents of the community (R. 234, 236, 262, 267, 275, 295, 296, 320, 348, 357, 360, 364, 368, 379).

From an analysis of the statute and an examination of its origin and history, and under the decisions heretofore interpreting Section 695, it is respectfully submitted that the exclusion of the statement was proper.

POINT II

The holding of the Circuit Court of Appeals that the trial court's denial of petitioners' demand to inspect without conditions attached, a statement made by respondent's witness, did not constitute reversible error.

When defendants' counsel, on cross-examination of plaintiff's witness, Laurence Bona, demanded the production of the statement given by the witness to plaintiff's attorney, the court advised him of the rule in the district that such production and inspection would permit the plaintiff to offer the statement in evidence (R. 107), and later stated: "That is the rule followed by the judges in this district" (R. 234).

This rule was enunciated in 1891 by Judge Lacombe in *Edison Electric Light Co. v. United States Electric Light Co.*, 45 Fed. 55 (C. C. S. D. N. Y.), and followed in *McCarthy v. Palmer*, 29 Fed. Supp. 585 (E. D. N. Y.), affirmed on other grounds in 113 F. (2d) 721 (C. C. A. 2, 1940).

The Circuit Court of Appeals disapproves of this rule in the following language (R. 473):

"At any rate, the old 'fixed principle' of keeping the opponent in the dark as to the tenor of the evidence in one's possession is now out of date. The appendant rule here in question is equally so. It is as anachronistic as the buttons on the sleeve of a man's coat; but such a legal rule is more important than coat-sleeve buttons. As it cannot be reconciled with the liberality as to depositions and discovery contained in the new Rules, we reject it."

The majority, however, refused to reverse for the reasons given as follows (R. 473):

"Nevertheless, we do not reverse here for error in the trial judge's ruling, for these reasons: (1)

the written statement of the witness could, at most, have been used for purposes of impeachment. As that statement is not in the record before us, it is impossible for us to know whether it contained any remarks contradicting the witness' testimony at the trial so that it would have served for impeaching purposes. If counsel wanted to assign error, he should have asked the trial judge to certify that statement to us, as part of the record on appeal. Since the statement is not before us, the result, if we were to reverse, would be to send the case back on the mere chance that the statement may contain matter which would have led to such an impeachment of the witness as materially to affect the jury's verdict. A verdict should not be so lightly disturbed. (2) Moreover, we cannot say that the trial judge or appellants' counsel was unreasonable in relying on Judge Lacombe's decision in the *Edison Electric* case. (Certainly appellants' counsel was not surprised, since it happens that he had, on behalf of the same clients he represents here, successfully persuaded the judge to render the decision in *McCarthy v. Palmer, supra*). In the circumstances, it would be unwise to overturn a verdict because of the erroneous ruling on this point."

Rule 26(b) is entitled "Depositions Pending Actions". Rule 34 is entitled "Discovery and Production of Documents and Things for Inspection, Copying or Photographing". Both of these rules seem to indicate that they apply to procedure preliminary to trial, and not to situations which develop during the course of cross-examination of a witness at the trial.

The old rule, applicable in the Eastern District, has now been rejected (R. 473). As the document was not marked by counsel for identification, there is nothing to show that the Court's ruling was prejudicial to the petitioners or warranted a reversal.

POINT III

In the personal injury action the petitioners had the burden of proving contributory negligence.

The Trial Court charged that the petitioners had the burden of proving contributory negligence (R. 387) and petitioners excepted (R. 394). They then requested the Court to charge (16th request, R. 403):

"In the personal injury action, plaintiff has the burden of proving freedom from contributory negligence."

To the refusal to charge this request they excepted (R. 395).

The Circuit Court of Appeals unanimously sustained the rulings of the Trial Court in holding that the burden of proving contributory negligence was on the petitioners (R. 475, 483) under the Conflict of Law Rule of New York.

a. Petitioners' request No. 16 was too broad in scope and, therefore, was properly denied.

As to the causes of action for personal injury, the petitioners, in the first place, are not in a position to urge the exception to the refusal to charge this request. The request was a general request covering the personal injury action and applied to both the first cause of action predicated upon Chapter 160, Section 138 (Appendix, p. 35), of the Massachusetts Laws, the bell and whistle law, and to the second, based upon the common law. In their request No. 5 (R. 401), the petitioners asked the Court to charge that under the counts based upon common law, ordinary negligence would defeat the respondent and that in counts based upon Chapter 160, Sections 232 and 138 (Appendix, p. 35), gross or wilful negligence or violation of law would defeat the respondent. The Court in effect charged as requested (R. 388, 395), to which no exception was taken (R. 895). Having invoked this ruling by request No. 5 (R. 401), thereby

consenting to the applicability of Section 232 (Appendix p. 35), as to the first cause of action, counsel cannot now complain of the denial of his 16th request, which obviously is so broad in scope that it includes the personal injury action as set forth in both the first and second causes of action.

b. Under the New York conflict of law rule, the charge was proper.

It is fundamental that in transitory tort actions the rights of the parties are governed by the law of the state where it arose. Since this tort occurred in Massachusetts, the law of that state is generally controlling. This Court has held that in considering the laws of different states in diversity of citizenship cases, the decision of the "highest state court is the final authority on state law", where it has expounded the law.

Fidelity Trust Co. v. Field, 311 U. S. 169, 177 (1940).

In following this rule, the Circuit Court of Appeals held (R. 475):

"If we were to reject the Rule (Rule 8c) we would then turn to the decisions of the New York Courts including those relating to conflict of laws. *Erie R. Co. v. Tompkins*, 304 U. S. 64; *Klaxon Co. v. Stentor Co.*, 313 U. S. 487. While with respect to intra-mural transactions, New York courts hold that the burden of proof is on the plaintiff, in a case such as this, they would apply, as a matter of conflict of laws, the Massachusetts law. *Fitzpatrick v. International Ry. Co.*, 252 N. Y. 127."

The petitioners assert that the determinations of the courts of New York in this respect are here controlling (brief p. 25). If that be so, the courts of New York have answered, holding that in circumstances such as these, statutes dealing with contributory negligence are of substance.

In *Fitzpatrick v. International Ry. Co.*, 252 N. Y. 127 (1929), the plaintiff, injured in Ontario, Canada, recovered in New York under Ontario laws and ordinances. Ontario has a comparative negligence statute. The trial judge under that statute charged that the burden of proving contributory negligence was on the defendant. The Court of Appeals said (p. 134):

"While it is true that in this state we speak of the proof of freedom from contributory negligence as being a burden of proof resting upon the plaintiff, it is, in reality, even here, more than a mere burden of proof, it is a substantive part of the plaintiff's right to recover. At common law a person has no cause of action for negligence, if he himself has contributed, in the slightest degree, to bring it about. A defendant's negligence is not sufficient to justify a recovery. . . . But whether the plaintiff has the burden in the first instance of proving freedom from contributory negligence, or the defendant the burden of proving contributory negligence, the substantive right to a recovery remains the same; the slightest contributory negligence upon the part of the plaintiff, no matter how or by whom it may be proven, bars recovery, establishes that there is and was no cause of action, no right to damages.

The Contributory Negligence Act of Ontario does more than touch or affect a matter of procedure; it goes beyond directing who shall first proceed to prove that the act of the defendant was solely responsible for the act or the damage. The act gives a right to recover not recognized by the common law. It provides that, even if the plaintiff be guilty of contributory negligence, he may yet recover, if the defendant were more negligent; the recovery, however, being limited to the surplus degree of negligence, as figured out by a jury. The law of the state of New York has no application under such circumstances; it is impossible of application. As a mere matter of procedure, the plaintiff here must prove his freedom from contributory negligence, but, if in his proof he fails to establish his freedom from contributing neglect or shows that he was neglectful, his complaint must be dismissed. He has no cause of action. . . . As we

have said, the Ontario act goes beyond a matter of procedure and gives a right unknown to the common law, the right of an injured person to recover for another's negligence, even though contributing by his own neglect to bring it about. For these reasons the trial court was quite correct in charging the jury in accordance with the Ontario statute.

The appellant suggests that, as this act does not refer to the burden of proof, the plaintiff, under our form of procedure, should have the burden of proving either freedom from contributing negligence or else the degree to which his own negligence contributed. We have no such law in this state. To follow the appellant's suggestion would still require our courts to adopt a portion of the Ontario statute. If we are to adopt a part we must apply it as a whole, because it affects the substantial rights of the parties. Under our rule, it would be impossible for the plaintiff to prove his own contributing neglect, without proving himself out of court, as we have no comparative negligence rule for actions at common law. As has been stated more than once, this action is under the Ontario statute.

Furthermore, the courts of this State are not unaccustomed to the application of the law of contributory negligence adopted by the Ontario act. We have a similar provision under section 3 of the Federal Employers' Liability Act (Act of April 22, 1908, 35 Stat. at Large 66, ch. 149). Although the acts of Congress form part of the laws of the State of New York (*Central Vermont Ry. Co. v. White*, 238 U. S. 507), unlike the laws of Ontario, yet the application, when it is to be made, is very much similar in both instances. The burden of proof has also been shifted in death cases, (Decedent Estate Law (Cons. Laws ch. 131, § 131). Under the Workmen's Compensation Law (Laws of 1922, ch. 615, § 11; Cons. Laws, ch. 67) if an employer fails to insure his employees, the employee may maintain an action in the courts for damages on account of an injury received. Not only shall it be unnecessary to plead or prove freedom from contributory negligence, but even the defense of contributory negligence, may not be pleaded. (See, also *Danielsen v. Morse Dry Dock & Repair Co.*, 235 N. Y. 439; as to the

rule under the maritime law and our previous State Labor Law.) *Jacobus v. Colgate* (217 N. Y. 235) may be consulted for an explanation of the difference between rights and remedies, the former pertaining to the law of the place of occasion and the latter to the law of the forum. (See, also, *Duggan v. Bay State Street Ry. Co.*, 230 Mass. 370.) The acts giving a right of recovery for negligence causing death generally contain a time limitation. These short Statutes of Limitations of foreign jurisdictions have been applied by our courts as constituting a condition or part of the right or cause of action (*Johnson v. Phoenix Bridge Co.*, 197 N. Y. 316)."

The defendants pleaded in their answer Chapter 160, Section 232, imposing liability for violation of Section 138, unless plaintiff is guilty of gross or wilful negligence, or unlawful act (R. 23).

Under Chapter 160, Section 232, it is clear that a person injured by a railroad at its crossing may recover unless it is shown that in addition to a mere want of ordinary care he was guilty of gross or wilful negligence or was acting in violation of law. This statute varies the ordinary common law liability under which a recovery is allowable only if the plaintiff is free from ordinary negligence and requires that the plaintiff in order to be barred from recovery must be guilty of gross or wilful negligence or a violation of the statute.

This statute is in effect similar to the Ontario statute construed in the *Fitzpatrick* case, and a New York court would hold that it must enforce it in its entirety, as it enforced the Ontario statute, irrespective of any decisions in the Massachusetts courts that the question of burden of proof under Section 85 of Chapter 231 is a matter of procedure. If this action were in the Massachusetts court, the plaintiff could recover on his first cause of action under the statute even though he were guilty of want of ordinary care. If the action were brought in the state courts of New York and the New York rule of burden of proof were

applied, plaintiff's failure to show exercise of ordinary care would result in a dismissal, a situation considered in the *Fitzpatrick* case. It is therefore obvious, as pointed out in that case, that the law of the State of New York would have no application under such circumstances, and the court would be bound to apply the Massachusetts statutes in their entirety.

The holding of the Circuit Court of Appeals is not in conflict with *Sampson v. Channell*, 110 F. (2d) 754 (C. C. A. 1, 1940), cert. denied 310 U. S. 650, nor with *Fort Dodge Hotel Co. v. Bartelt*, 119 F. (2d) 253 (C. C. A. 8, 1941). In the *Sampson* case the court applied the conflict of laws rule of Massachusetts. In the *Fort Dodge Hotel Co.* case, where the question of diversity of citizenship was not involved, the court applied the law of Iowa, where the accident occurred and where the action was tried. The same principle of conflict of law was followed in *Boyle v. Ward*, 125 F. (2d) 672 (C. C. A. 3, 1942).

In the *Sampson* case, the court, after reviewing the principle of conflict of laws in sister states, said (p. 760):

"There is no doubt that in this situation the state courts of New York would have applied the same rule of conflict of laws, and would have looked to the *lex loci delicti*. *Fitzpatrick v. International Ry. Co.*, 252 N. Y. 127, 169 N. E. 112, 68 A. L. R. 801."

The holdings in *Geoghegan v. The Atlas Steamship Co.*, 3 Misc. 224 (1893), aff'd 146 N. Y. 369 (1895); *Wright v. Palmison*, 237 App. Div. 22 (2nd Dep't, 1932), and *Clark v. Harnischfeger*, 238 App. Div. 493 (2nd Dep't, 1933), in no way relate to or affect the decision in the *Fitzpatrick* case. Nor is *Jarrett v. Wabash Ry. Co.*, 57 F. (2d) 669, 671, cert. denied 287 U. S. 627 (1932), in conflict therewith.

c. Under Rule 8c, the charge was correct.

The federal rules were adopted after very careful consideration. The affirmative defenses set out in Rule 8c were apparently intended to include, and probably did include, everything which could and should in federal practice be set up as an affirmative defense.

Whether contributory negligence is a matter of procedure or of substance, is immaterial to the facts and the applicable Conflict of Law Rule in this case. It has been held, however, in this court that contributory negligence is a matter of substance, *Central Vt. Ry. Co. v. White*, 238 U. S. 507 (1915), which case was cited with approval in *Cities Service Oil Co. v. Dunlop*, 308 U. S. 208, 212 (1939). Burden of proof of contributory negligence in the federal courts has constantly been held to be upon the defendant. *Pokora v. Wabash Ry. Co.*, 292 U. S. 98 (1934).

In view of this situation, it was not strange, therefore, that the draftsmen of these rules of procedure, recognizing this traditional view of the federal courts, included contributory negligence as an affirmative defense. The Circuit Court of Appeals for the Second Circuit, in *LaGuerra v. Brasileiro*, 124 F. (2d) 553, 555 (1942), Clark, J., writing, said:

"It may be added, further, that defendant pleaded the plaintiff's negligence, upon which it relied; and if we apply the traditional rule of burden of proof envisaged by federal rule 8(c), 28 U. S. C. A., following section 723(c), which is also the rule of admiralty, *The Anna O'Boyle*, 2 Cir., Dec. 11, 1941, 124 F. 2d 180,—it seems quite clear that upon the record at the close of plaintiff's case this burden was in no way satisfied."

See also "The Tompkins Case and The Federal Rules" by Judge Clark, 1 F. R. D. 417.

Under both the New York rule on conflict of laws and Rule 8(c), the burden of proving contributory negligence was on the petitioners.

CONCLUSION

It is respectfully submitted that the judgment of the Circuit Court of Appeals for the Second Circuit should be affirmed.

**WILLIAM PAUL ALLEN,
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**BENJAMIN DIAMOND,
of Counsel.**

APPENDIX

Additional Statutes Involved

GENERAL LAWS OF MASSACHUSETTS

Chapter 160, Section 138 of the General Laws of Massachusetts, Tercentenary Edition, 1932, reads as follows:

"Every railroad corporation shall cause a bell of at least 35 lbs. in weight, and a steam whistle to be placed on each locomotive engine passing upon its railroad; and such bell shall be rung or at least three separate and distinct blasts of such whistle sounded at the distance of at least 80 rods from the place where the railroad crosses upon the same level with any public way or travelled place over which a signboard is required to be maintained as provided in sections 140 and 141; and such bell shall be rung or such whistle sounded continuously or alternately until the engine has crossed such way or traveled place. This section shall not affect the authority conferred upon the department by the following section."

Chapter 160, Section 232 of the General Laws of Massachusetts, Tercentenary Edition, 1932, reads as follows:

"If a person is injured in his person or property by collision with the engines or cars of rail-borne motor cars of a railroad corporation at a crossing such as is described in section one hundred and thirty-eight, and it appears that the corporation neglected to give the signals required by said section or to give signals by such means or in such manner as may be prescribed by orders of the department, and that such neglect contributed to the injury, the corporation shall be liable for all damages caused by the collision, or to a fine recoverable by indictment as provided in section three of chapter two hundred and twenty-nine, or, if the life of a person so injured is lost, to damages recoverable in tort, as provided in said section three, unless it is

shown that in addition to a mere want of ordinary care, the person injured or the person who had charge of his person or property was, at the time of the collision, guilty of gross or wilful negligence, or was acting in violation of the law, and that such gross or wilful negligence or unlawful act contributed to the injury."

Chapter 229, Section 3 of the General Laws of Massachusetts, Tercentenary Edition, 1932, reads as follows:

"If a corporation operating a railroad, street railway or electric railroad, by reason of its negligence or of the unfitness or negligence of its agents or servants while engaged in its business causes the death of a passenger, or of a person in the exercise of due care who is not a passenger or in the employment of such corporation, it shall be punished by a fine of not less than five hundred nor more than ten thousand dollars; be recovered by an indictment prosecuted within one year after the time of the injury which caused the death, which shall be paid to the executor or administrator and distributed as provided in section one; but a corporation which operates a railroad shall not be so liable for the death of a person while walking or being upon its railroad contrary to law or to the reasonable rules and regulations of the corporation and one which operates an electric railroad shall not be so liable for the death of a person while so walking or being on that part of its railroad not within the limits of a highway. Such corporation shall also be liable in damages in the sum of not less than five hundred nor more than ten thousand dollars, to be assessed with reference to the degree of culpability of the corporation or of its servants or agents which shall be recovered in an action of tort, begun within one year after the injury which caused the death, by the executor or administrator of the deceased and distributed as provided in section one."

Chapter 231, Section 85 of the General Laws of Massachusetts, Tercentenary Edition, 1932, reads as follows:

"In all actions, civil or criminal, to recover damages for injuries to the person or property or for causing

the death of a person, the person injured or killed shall be presumed to have been in the exercise of due care and contributory negligence on his part shall be an affirmative defense to be set up in the answer and proved by the defendant."

Chapter 90, Section 15 of the General Laws of Massachusetts, Tercentenary Edition, 1932, reads as follows:

"Every person operating a motor vehicle, upon approaching a railroad crossing at grade, shall reduce the speed of the vehicle to a reasonable and proper rate, and shall proceed cautiously over the crossing. Whoever violates any provision of this section shall be punished by a fine of not less than ten nor more than fifty dollars."

SECTION 374-A:—CIVIL PRACTICE ACT OF NEW YORK:

"§ 374-a. *Admissibility of certain written records.* Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event, shall be admissible in evidence in proof of said act, transaction, occurrence or event, if the trial judge shall find that it was made in the regular course of any business, and that it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence or event, or within a reasonable time thereafter. All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but they shall not affect its admissibility. The term business shall include business, profession, occupation and calling of every kind. [Added by L. 1928, ch. 532, in effect Sept. 1.]"

MODEL ACT PROPOSED BY COMMITTEE OF COMMONWEALTH FUND:

"Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event shall be admissible in evidence in proof of said act,

transaction, occurrence or event, if the trial judge shall find that it was made in the regular course of any business, and that it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence or event or within a reasonable time thereafter. All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but they shall not affect its admissibility. The term business shall include business, profession, occupation and calling of every kind." (The Law of Evidence, 1927, Yale University Press, p. 63.)

PUBLIC LAWS OF MICHIGAN—1935—No. 15:

14207. Books of account and memorandum as evidence: surrounding circumstances: photostatic reproductions.

Sec. 53. Any writing or record whether in the form of an entry in a book or otherwise, made as a memorandum of any act, transaction, occurrence or event shall be admissible in evidence in all trials, hearings and proceedings in any cause or suit in any court, or before any officer, arbitrators, or referees, in proof of said act, transaction, occurrence or event if it was made in the regular course of any business and it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence or event or within a reasonable time thereafter. All other circumstances of the making of such writing or record including lack of personal knowledge by the entrant or maker, may be shown to affect its weight but not its admissibility. The term 'business' shall include business, profession, occupation and calling of every kind. The lack of an entry regarding any act, transaction, occurrence or event in any writing or record so proved may be received as evidence that no such act, transaction, occurrence or event did, in fact, take place. Any photostatic or photographic reproduction of any such writing or record shall be admissible in evidence in any such trial, hearing or proceeding by order of the court, made within its discretion, upon motion with notice of not less than four days.

All circumstances of the making of such photostatic or photographic reproduction may be shown upon such trial, hearing or proceeding to affect the weight but not the admissibility of such evidence." O

PUBLIC LAWS OF RHODE ISLAND, 1927-28, PAGE 528

Chapter 1161, Section 49:

"In any civil proceeding any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event shall be admissible in evidence in proof of said act, transaction, occurrence or event, if the trial judge shall find that it was made in the regular course of any business, and that it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence or event, or within a reasonable time thereafter. The trial judge, in his discretion, before admitting such writing or record in evidence, may, to such extent as he deems practicable or desirable, but to no greater extent than the law required prior to the passage of this act, require the party offering said writing or record offered or the facts therein stated were transcribed or taken, and to call as his witness any person who made the writing or record offered or the original or any other writing or record from which the writing or record offered or the facts therein stated were transcribed or taken, or who has personal knowledge of the facts stated in the writing or record offered. And when such evidence shall be admitted, all other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight. The term business shall include business, profession, occupation and calling of every kind."

PURDON'S PENNSYLVANIA STATUTES ANNOTATED

Title 28, Section 91b:

"Business records:

A record of an act, condition or event shall, in so far as relevant, be competent evidence if the custodian or

other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission. 1939, May 4, P. L. 42, No. 35, § 2."

WIGMORE ON EVIDENCE (3RD ED., 1940)

Section 1422, page 204, Volume V:

"Second Principle: Circumstantial Probability of Trustworthiness. The second principle which, combined with the first, satisfies us to accept the evidence untested, is in the nature of a practicable substitute for the ordinary test of cross-examination. We see that under certain circumstances the probability of accuracy and trustworthiness of statement is practically sufficient, if not quite equivalent to that of statements tested in the conventional manner. This circumstantial probability of trustworthiness is found in a variety of circumstances sanctioned by judicial practice; and it is usually from one of these salient circumstances that the exception takes its name. There is no comprehensive attempt to secure uniformity in the degree of trustworthiness which these circumstances presuppose. It is merely that common sense and experience have from time to time pointed them out as practically adequate substitutes for the ordinary test, at least, in view of the necessity of the situation."

Section 1527, page 375, Volume V:

"No Motive to Misrepresent. It is often added that there must have been no *motive to misrepresent*. This does not mean that the offeror must show an absence of all such motives; but merely that if the existence of a fairly positive counter-motive to misrepresent is made to appear in a particular instance the entry would be excluded. This limitation is a fair one, provided it be not interpreted with over-strictness. The exclusion of the notorious Fleet registers of marriage (*post*, § 1642) illustrates the kind of circumstances that call for the application of this requirement."

Section 1566, page 424, Volume V:

"No Interest to Misrepresent; Owner's Statement excluded. The general principle of a circumstantial probability of trustworthiness (*ante*, § 1422) is seen in the requirement that the declarant shall have had no interest or no motive to misrepresent; the words 'interest' and 'motive' being here used by the Courts interchangeably. The general notion is that he must stand in such a position that the Court cannot see any reason to expect misrepresentation."

Section 1438, page 230, Volume V:

"In general; Solemnity of the Situation. All Courts have agreed, with more or less difference of language, that the *approach of death* produces a state of mind in which the utterances of the dying person are to be taken as free from all ordinary motives to mis-state. The great dramatist expressed the common feeling long before it was sanctioned by judicial opinion. In the following passages will be found the now classical sentences of the earlier English judges, as well as later ones pointing out clearly how the situation supplies a circumstantial probability of accuracy equivalent to that of the tests of oath and cross-examination."

Section 1482, page 297, Volume V:

"General Principle. The circumstantial indication of trustworthiness (*ante*, § 1422) has been found in the probability that the 'natural effusions' (to use Lord Eldon's often-quoted phrase) of those who talk over family affairs when no special reason for bias or passion exists are fairly trustworthy, and should be given weight by judges and juries, as they are in the ordinary affairs of life."

Section 1484, page 301, Volume V:

"No Interest or Motive to Deceive. The existence of a controversy is only one circumstance (though the most common one) likely to produce a bias fatal to the trustworthiness of the declaration. Judicial opinion seems to hold, and properly, that other considerations

may under certain circumstances operate to exclude the declarations. In general, they would be excluded where there is any specific and adequate reason to suppose the existence of a motive inconsistent with a fair degree of sincerity. In Lord Eldon's words, they must appear to be the 'natural effusions of a party standing in an even position'."

Section 1747, page 135, Volume VI:

"(1) *General Principle of the Exception.* This general principle is based on the experience that, under certain external circumstances of physical shock, a stress of nervous excitement may be produced which stills the reflective faculties and removes their control, so that the utterance which then occurs is a spontaneous and sincere response to the actual sensations and perceptions already produced by the external shock. Since this utterance is made under the immediate and uncontrolled domination of the senses, and during the brief period when considerations of self-interest could not have been brought fully to bear by reasoned reflection, the utterance may be taken as particularly trustworthy (or, at least, as lacking the usual grounds of untrustworthiness), and thus as expressing the real tenor of the speaker's belief as to the facts just observed by him; and may therefore be received as testimony to those facts."

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Supreme Court of the United States

OCTOBER TERM, 1942.

No. 300.

HOWARD S. PALMER, HENRY B. SAWYER and
JAMES LEE LOOMIS, as Trustees for The New
York, New Haven and Hartford Railroad Company,
Petitioners,

—against—

HOWARD F. HOFFMAN, individually and as Adminis-
trator of the goods, chattels and credits which were of
Lucz Hoffman, also known as Lucz T. Spraker Hoff-
man, deceased,

Respondent.

PETITION FOR A REHEARING.

EDWARD R. BRUMLEY,
Counsel for Petitioners.

A. G. KUEBACH,
R. W. PICKARD,
Of Counsel.

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Supreme Court of the United States

OCTOBER TERM, 1942.

No. 300.

HOWARD S. PALMER, HENRY B. SAWYER and JAMES LEE LOOMIS, as Trustees for The New York, New Haven and Hartford Railroad Company,

Petitioners,

—against—

HOWARD F. HOFFMAN, individually and as Administrator of the goods, chattels and credits which were of Inez Hoffman, also known as Inez T. Spraker Hoffman, deceased,

Respondent.

I.

Petition for a Rehearing.

Come now the above-named petitioners, Howard S. Palmer, Henry B. Sawyer and James Lee Loomis, as Trustees for The New York, New Haven and Hartford Railroad Company, and present this, their petition for a rehearing of the above-entitled cause, and, in support thereof, respectfully show:

A. The Question Presented.

Were petitioners' exceptions to the charge and to the failure to charge sufficiently specific to bring into focus the precise nature of the alleged error?

The position of petitioners may be summarized as follows: parts of the Second and Fourth Causes of Action alone involve the defense of contributory negligence; the exception to the charge on burden of proof of contributory negligence is expressly connected with Request No. 16 and the two together point solely to the personal injury claim based on the common law, part of the Second Cause of Action; the trial court, in charging on burden of proof of contributory negligence and on contributory negligence, referred to contributory negligence as a defense at common law; petitioners, in several requests to charge, distinguished between contributory negligence at common law and statutory violation, and pointed out that contributory negligence was a defense at common law; petitioners' motion to dismiss and for a directed verdict likewise made clear that contributory negligence was a defense at common law.

Petitioners respectfully submit that their exceptions to the charge in respect of burden of proof of contributory negligence and to the failure to charge Request No. 16 refer only to the common law basis of the Second Cause of Action, and that both exceptions were "sufficiently specific to bring into focus the precise nature of the alleged error" (quotation from the opinion of Mr. Justice Douglas).

B. The Record.

(1) The complaint.

The First Cause of Action, on behalf of Howard F. Hoffman, is founded on a signal statute. It sets out (R. 5, paragraph Tenth of Complaint) Section 138 of Chapter 160, General Laws of Massachusetts (1932), which requires a railroad to ring a bell or blow a whistle upon approaching a grade crossing. It alleges (R. 6,

paragraph Fourteenth of Complaint) a violation of this Section by petitioners, and that the accident occurred solely through such violation (R. 6, paragraph Fifteenth of Complaint).

The First Cause of Action sets out (R. 5, 6, paragraph Twelfth of Complaint) Section 15 of Chapter 90, General Laws of Massachusetts (1932), which requires every person operating a motor vehicle, upon approaching a railroad crossing at grade, to reduce speed of the vehicle to a reasonable and proper rate and to proceed cautiously over the crossing. The Complaint alleges that respondent complied with this section (R. 6, paragraph Fifteenth of Complaint). Violation of this Section is one of the defenses to the statutory right of action.

The signal statute must be read in connection with Section 232 of Chapter 160, referred to in the opinion of Mr. Justice Douglas and pleaded by petitioners (R. 23). If a person is injured by a railroad's violation of Section 138 he may recover "unless it is shown that, in addition to a mere want of ordinary care, the person injured . . . was . . . guilty of gross or wilful negligence, or was acting in violation of the law . . .".

The Second Cause of Action alleges (R. 7-9) that the accident occurred solely through a violation of Section 138, Chapter 160 (it realleges paragraph Fifteenth), and through the common law negligence of petitioners. The First Cause of Action is brought under a statute, the Second, under the same statute and at common law. While the intended basis of the latter was probably the common law, because of respondent's pleading neither the trial court nor petitioners could refer to it as wholly and solely a common law cause of action. Both the trial court and petitioners had to rely upon the distinction between contributory negligence at common law and violation of the statute.

The Third Cause of Action, in connection with the death case, repeats (R. 9, paragraph Twenty-second of Complaint) the references to Section 138 of Chapter 160, Section 15 of Chapter 90, and Section 140 of Chapter 160, of the General Laws of Massachusetts. It alleges that the accident occurred solely through violation of Section 138, Chapter 160. It also sets out (R. 10, paragraph Twenty-eight of Complaint), Section 3 of Chapter 229 which gives a right of recovery for death, the damages to be measured by "the degree of culpability".

The Fourth Cause of Action, also in connection with the death case, alleges (R. 11, paragraph Thirty-first of Complaint) that the accident occurred solely through the violation by petitioners of Section 138, Chapter 160, and through the common law negligence of petitioners, and refers to Section 3 of Chapter 229 giving a right of recovery for death.

(2) The exception to the charge on burden of proof of contributory negligence and the exception to the refusal to charge Request No. 16.

Analysis of the complaint makes clear the limited application of the above exceptions. They applied only to that part of the Second Cause of Action which recites common law negligence.

The Record shows (R. 394, 395):

"Mr. Brumley: I respectfully except to your Honor's charge in respect of burden of proof on contributory negligence.

"The Court: Yes; I will give you an exception.

"Mr. Brumley: I point that out in connection with our Request No. 16.

"The Court: Yes; and I did not pass upon the request, because I felt that you ought to take an

exception in the charge on that; do you see? You have it, at any rate.

"Mr. Brumley: We except to the charge, and we except to the failure to charge, and we except to the failure to charge in respect of request No. 16.

"Mr. Allen: Will you give me the whole request, please?

"The Court: Wait a minute. I will give it to you so that you will not have any trouble:

"In the personal injury action, plaintiff has the burden of proving freedom from contributory negligence."

"That I refuse to charge, and give the defendant an exception."

This clearly points to the personal injury claim based on the common law—part of the Second Cause of Action.

(3) The charge on burden of proof of contributory negligence.

The charge on burden of proof of contributory negligence reads (R. 387):

"In all actions of a civil nature to recover damages for the injuries to the person or property or for causing the death of a person, the person injured or killed shall be presumed to have been in the exercise of due care, and contributory negligence on his part shall be an affirmative defense to be set up in the answer and proved by the defendant."

"That means, gentlemen, that the defendant has the burden, as I have just told you, of proving the contributory negligence. The definition of that burden is exactly like the one I just gave you as to the contributory negligence.

"After you have taken up this question of contributory negligence, if the scales are evenly balanced, the defendant has not sustained the burden; but if the defendant's testimony on contributory negligence weighs a little bit more than the other side's, then, of course, the defendant has sustained the burden of contributory negligence."

This part of the charge necessarily refers only to contributory negligence at common law because contributory negligence is not a defense to an action under the signal statute. The exceptions to the charge and to the failure to charge Request No. 16, noted by petitioners, objected to the charge on burden of proof in the personal injury action. All this points unerringly to that part of the Second Cause of Action which recites common law negligence.

(4) Other requests to charge.

Other requests to charge distinguished between the common law and the Massachusetts statutes, between contributory negligence and violation of law:

The trial court charged petitioners' Request No. 1 (R. 387, 395, 400), which reads:

"Section 15 of Chapter 90 requires active diligence by a motor vehicle operator, and its command is not couched in terms of due care and diligence."

Petitioners made the distinction to the trial court in their Request No. 5 (R. 401), which reads:

"In counts based upon the common law, a finding of ordinary negligence on the part of plaintiffs will defeat recovery. In counts based upon General Laws, c. 160, §232, charging defendants with failure to give

signals required by §138, the plaintiffs would have no right to recovery if found to be grossly or wilfully negligent, or guilty of some violation of law."

The trial court charged petitioners' Request No. 6 (R. 389, 395, 401), which reads:

"If there was a violation of a penal statute as a contributing cause, recovery is barred at common law as well as under the grade crossing statute, and a violation of §15 of c. 90 is a violation of a penal statute."

The trial court adopted the view that violation of a penal statute would bar recovery both under the signal statute and at common law, whereas contributory negligence would bar recovery only at common law.

Petitioners' Request No. 11 (R. 402) reads:

"If plaintiff-operator violated §15 of c. 90 there can be no recovery for the death of his wife under §232, c. 160, and §3 of c. 229."

(5) Other parts of the charge.

Other parts of the charge distinguish between the common law and the Massachusetts statutes, between contributory negligence and violation of law. Not only did petitioners differentiate in their exceptions to the charge and in the requests to charge, but the trial court had clearly in mind "the precise nature of the alleged error".

The court charged (R. 388):

"I charged you about the law, which is aside from the statutory law, and that is what we call the common law. There are two sets of laws that I have charged you—and keep in mind that one is statutory;

meaning that which I have read to you as the statutes, and the other one is the common law—that which I have charged you aside from the statutes. In basing your analysis of the testimony under the common law, a finding of ordinary negligence on the part of the plaintiff will defeat recovery.”

The trial court expressly said that under the common law a finding of ordinary negligence on the part of the plaintiff would defeat recovery (R. 388). The trial court also charged that contributory negligence would defeat the personal injury and the death cases (R. 387, 388, 394). It is clear that the reference is to contributory negligence at common law, otherwise the charge would completely disregard the effect of the statutory defenses to the claims based upon the statute, concerning which the court charged (R. 389, 393).

(6) Petitioners' motion to dismiss and motion for directed verdict.

Petitioners' motion to dismiss the Complaint (R. 224, 225), and their motion for a directed verdict (R. 382), specifically called to the attention of the trial court that contributory negligence was a defense to any claim at common law.

C. Conclusions.

Contributory negligence is the counterpart of negligence. The Record shows that the term had a clear, definite meaning and application for the trial court and the parties, in spite of the stress of the trial and the several Massachusetts statutes involved. The cases of *Monley v. Boston & Maine R.*, 159 Mass. 493 (1893); *Phelps v. New England R. Co.*, 172 Mass. 98 (1898); *McDonald v. New York C. & H. R. Co.*, 186 Mass. 474 (1904); and *Kenny v. Boston & Maine R.*, 188 Mass. 127 (1905), held that the

burden of proving gross or wilful negligence, or violation of the statute (not "the burden of proving contributory negligence") was on the defendant.

In *Morel v. New York, New Haven & H. R. R.*, 238 Mass. 392 (1921), the ground for recovery was failure to give the statutory signals under a statute of 1906, now Section 232, Chapter 160. The opinion reads in part (p. 395):

"The so called due care statute, to which reference is made in the request, has no application to actions for injuries caused by failure to give the statutory signals required from those in charge of locomotives at grade crossings."

The due care statute referred to was that of 1914, now Section 85 of Chapter 231. That Section, while in terms applicable to all actions to recover damages for injuries or for death, is not applicable when an action is based on liability for damages in case of collision at grade crossings under Section 232, Chapter 160.

Late grade crossing cases in Massachusetts have also made the same distinction: *Fortune v. New York, N. H. & Hartford R. R.*, 271 Mass. 101 (1930); *Klegerman v. New York, N. H. & Hartford R. R.*, 290 Mass. 268 (1935); *Lincoln v. New York, N. H. & Hartford R. R.*, 291 Mass. 116 (1935); and *Copithorn v. Boston & Maine Railroad*, 309 Mass. 363 (1941). Contributory negligence is treated as one idea, violation of the statute as quite another and different idea.

As petitioners read the opinion, if their exception to the charge on contributory negligence, and their exception to the refusal to charge Request No. 16, had expressly referred to "common law", the decree would have been reversed. To have written in "common law" in the

request, or to have spelt it out in the exception to the charge, would have been mere surplusage.

Respondent admits (Respondent's Brief, pp. 27, 28) that the trial court charged that under counts based upon the common law, ordinary negligence would defeat the respondent, and in counts based upon the statute, gross or wilful negligence or violation of law would defeat the respondent. As the First Cause of Action is statutory the reference to contributory negligence in Request No. 16 could not relate to it, but only to the common law part of the Second Cause of Action, where it would be of any avail, as explained by Request No. 5. It was hardly necessary for petitioners to submit Request No. 16 and advise the court at the same time that it was not intended to apply to an action based upon a statute, especially as it did not so apply under Massachusetts law or in the mind of the court. Contributory negligence was as foreign to the First Cause of Action as it would be to an action for breach of contract. Petitioners, not respondent, pleaded Section 232, Chapter 160, and properly eliminated contributory negligence as a defense to the statutory actions.

If petitioners adequately presented the question of burden of proof of contributory negligence in the personal injury claim based on the common law, then the court below should consider it solely from the New York law point of view. This petition has a larger significance than the interests of the parties—the effect of the characterization of a long established common law idea, and a judgment consistent with such characterization.

For the foregoing reasons it is respectfully urged that this petition for a rehearing be granted and that the decree of the Circuit Court of Appeals for the Second Circuit be, upon further consideration, reversed and the case remanded to the court below to examine and make an appropriate application of the New York law on the common law basis of the judgment in favor of Howard F. Hoffman, individually.

Respectfully submitted,

EDWARD R. BRUMLEY,
Counsel for Petitioners.

A. G. KUNBACH,
R. W. PICKARD,
Of Counsel.

II.

Certificate of Counsel.

The undersigned, Edward R. Brumley, counsel for the petitioners, Howard S. Palmer, Henry B. Sawyer and James Lee Loomis, as Trustees for The New York, New Haven and Hartford Railroad Company, hereby certifies that the foregoing petition for rehearing is filed in good faith; that he believes same to be meritorious; and that said petition for rehearing is not filed for the purpose of delay.

EDWARD R. BRUMLEY,
Counsel for Petitioners,
Room 3841, Grand Central Terminal,
New York City, N. Y.

SUPREME COURT OF THE UNITED STATES.

No. 300.—OCTOBER TERM, 1942.

Howard S. Palmer, Henry B. Sawyer
and James Lee Loomis, as Trustees for
the New York, New Haven and Hart-
ford Railroad Company, Petitioners,

vs.

Howard F. Hoffman, Individually and
as Administrator of the Goods, Chat-
tels and Credits which were of Inez
Hoffman, Also Known as Inez T.
Spraker Hoffman, Deceased.

On Writ of Certiorari
to the United States
Circuit Court of Ap-
peals for the Second
Circuit.

[February 1, 1943.]

Mr. Justice DOUGLAS delivered the opinion of the Court.

This case arose out of a grade crossing accident which occurred in Massachusetts. Diversity of citizenship brought it to the federal District Court in New York. There were several causes of action. The first two were on behalf of respondent individually, one being brought under a Massachusetts statute (Mass. Gen. L. (1932) c. 160 §§ 138, 232), the other at common law. The third and fourth were brought by respondent as administrator of the estate of his wife and alleged the same common law and statutory negligence as the first two counts. On the question of negligence the trial court submitted three issues to the jury—failure to ring a bell, to blow a whistle, to have a light burning in the front of the train. The jury returned a verdict in favor of respondent individually for some \$25,000 and in favor of respondent as administrator for \$9,000. The District Court entered judgment on the verdict. The Circuit Court of Appeals affirmed, one judge dissenting. 129 F. 2d 976. The case is here on a petition for a writ of certiorari which presents three points.

1. The accident occurred on the night of December 25, 1940. On December 27, 1940, the engineer of the train, who died before the trial, made a statement at a freight office of petitioners where he was interviewed by an assistant superintendent of the road and by a representative of the Massachusetts Public Utilities Com-

mission. See Mass. Gen. L. (1932) c. 159, § 29. This statement was offered in evidence by petitioners under the Act of June 20, 1936, 49 Stat. 1561, 28 U. S. C. § 695.¹ They offered to prove (in the language of the Act) that the statement was signed in the regular course of business, it being the regular course of such business to make such a statement. Respondent's objection to its introduction was sustained.

We agree with the majority view below that it was properly excluded.

We may assume that if the statement was made "in the regular course" of business, it would satisfy the other provisions of the Act. But we do not think that it was made "in the regular course" of business within the meaning of the Act. The business of the petitioners is the railroad business. That business like other enterprises entails the keeping of numerous books and records essential to its conduct or useful in its efficient operation. Though such books and records were considered reliable and trustworthy for major decisions in the industrial and business world, their use in litigation was greatly circumscribed or hedged about by the hearsay rule—restrictions which greatly increased the time and cost of making the proof where those who made the records were numerous.² 5 Wigmore, Evidence (3d ed., 1940) § 1530. It was that problem which started the movement towards adoption of

¹ "In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of said act, transaction, occurrence, or event, if it shall appear that it was made in the regular course of any business, and that it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter. All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but they shall not affect its admissibility. The term 'business' shall include business, profession, occupation, and calling of every kind."

² The problem was well stated by Judge Learned Hand in *Massachusetts Bonding & Ins. Co. v. Norwich Pharmacal Co.*, 18 F. 2d 934, 937: "The routine of modern affairs, mercantile, financial and industrial, is conducted with so extreme a division of labor that the transactions cannot be proved at first hand without the concurrence of persons, each of whom can contribute no more than a slight part, and that part not dependent on his memory of the event. Records, and records alone, are their adequate repository, and are in practice accepted as accurate upon the faith of the routine itself, and of the self-consistency of their contents. Unless they can be used in court without the task of calling those who at all stages had a part in the transactions recorded, nobody need ever pay a debt, if only his creditor does a large enough business."

legislation embodying the principles of the present Act. See Morgan et al., *The Law of Evidence, Some Proposals for its Reform* (1927) c. V. And the legislative history of the Act indicates the same purpose.³

The engineer's statement which was held inadmissible in this case falls into quite a different category.⁴ It is not a record made for the systematic conduct of the business as a business. An accident report may affect that business in the sense that it affords information on which the management may act. It is not, however, typical of entries made systematically or as a matter of routine to record events or occurrences, to reflect transactions with others, or to provide internal controls. The conduct of a business commonly entails the payment of tort claims incurred by the negligence of its employees. But the fact that a company makes a business out of recording its employees' versions of their accidents does not put those statements in the class of records made "in the regular course" of the business within the meaning of the Act. If it did, then any law office in the land could follow the same course, since business as defined in the Act includes the professions. We would then have a real perversion of a rule designed to facilitate admission of records which experience has shown to be quite trustworthy. Any business by installing a regular system for recording and preserving its version of accidents for which it was potentially liable could qualify those reports under the Act. The result would be that the Act would cover any system of recording events or occurrences provided it was "regular" and though it had little or nothing to do with the management or operation of the business as such. Preparation of cases for trial by virtue of being a "business" or incidental thereto would obtain the benefits of this liberalized version

³ Thus the report of the Senate Committee on the Judiciary incorporates the recommendation of the Attorney General who stated in support of the legislation, "The old common-law rule requires that every book entry be identified by the person making it. This is exceedingly difficult, if not impossible, in the case of an institution employing a large bookkeeping staff, particularly when the entries are made by machine. In a recent criminal case the Government was prevented from making out a prima-facie case by a ruling that entries in the books of a bank, made in the regular course of business, were not admissible in evidence unless the specific bookkeeper who made the entry could identify it. Since the bank employed 18 bookkeepers, and the entries were made by bookkeeping machines, this was impossible." S. Rep. No. 1965, 74th Cong., 2d Sess., pp. 1-2.

⁴ It is clear that it does not come within the exceptions as to declarations by a deceased witness. See *Shepard v. United States*, 290 U. S. 96; *Wigmore, supra*, chs. XLIX-LIV.

of the early shop book rule. The probability of trustworthiness of records because they were routine reflections of the day to day operations of a business would be forgotten as the basis of the rule. See *Conner v. Seattle, R. & S. Ry. Co.*, 56 Wash. 310, 312-313. Regularity of preparation would become the test rather than the character of the records and their earmarks of reliability (*Chesapeake & Delaware Canal Co. v. United States*, 250 U. S. 123, 128-129) acquired from their source and origin and the nature of their compilation. We cannot so completely empty the words of the Act of their historic meaning. If the Act is to be extended to apply not only to a "regular course" of a business but also to any "regular course" of conduct which may have some relationship to business, Congress not this Court must extend it. Such a major change which opens wide the door to avoidance of cross-examination should not be left to implication. Nor is it any answer to say that Congress has provided in the Act that the various circumstances of the making of the record should affect its weight not its admissibility. That provision comes into play only in case the other requirements of the Act are met.

In short, it is manifest that in this case those reports are not for the systematic conduct of the enterprise as a railroad business. Unlike payrolls, accounts receivable, accounts payable, bills of lading and the like these reports are calculated for use essentially in the court, not in the business. Their primary utility is in litigating, not in railroading.

It is, of course, not for us to take these reports out of the Act if Congress has put them in. But there is nothing in the background of the law on which this Act was built or in its legislative history which suggests for a moment that the business of preparing cases for trial should be included. In this connection it should be noted that the Act of May 6, 1910, 36 Stat. 350, 45 U. S. C. § 38, requires officers of common carriers by rail to make under oath monthly reports of railroad accidents to the Interstate Commerce Commission, setting forth the nature and causes of the accidents and the circumstances connected therewith. And the same Act (45 U. S. C. § 40) gives the Commission authority to investigate and to make reports upon such accidents. It is provided, however, that "Neither the report required by section 38 of this title nor any report of the investigation provided for in section 40 of this title nor any part thereof shall be admitted as evidence or used for any purpose in any suit or action for

damages growing out of any matter mentioned in said report or investigation." 45 U. S. C. § 41. A similar provision (36 Stat. 916, 54 Stat. 148, 45 U. S. C. § 33) bars the use in litigation of reports concerning accidents resulting from the failure of a locomotive boiler or its appurtenances. 45 U. S. C. §§ 32, 33. That legislation reveals an explicit Congressional policy to rule out reports of accidents which certainly have as great a claim to objectivity as the statement sought to be admitted in the present case. We can hardly suppose that Congress modified or qualified by implication these long standing statutes when it permitted records made "in the regular course" of business to be introduced. Nor can we assume that Congress having expressly prohibited the use of the company's reports on its accidents impliedly altered that policy when it came to reports by its employees to their superiors. The inference is wholly the other way. The several hundred years of history behind the Act (Wigmore, *supra*, §§ 1517-1520) indicate the nature of the reforms which it was designed to effect. It should of course be liberally interpreted so as to do away with the anachronistic rules which gave rise to its need and at which it was aimed. But "regular course" of business must find its meaning in the inherent nature of the business in question and in the methods systematically employed for the conduct of the business as a business.

II. One of respondent's witnesses testified on cross-examination that he had given a signed statement to one of respondent's lawyers. Counsel for petitioners asked to see it. The court ruled that if he called for and inspected the document, the door would be opened for respondent to offer the statement in evidence, in which case the court would admit it. See *Edison Electric Light Co. v. U. S. Electric Lighting Co.*, 45 Fed. 55, 59. Counsel for petitioners declined to inspect the statement and took an exception. Petitioners contend that that ruling was reversible error in light of Rule 26(b) and Rule 34 of the Rules of Civil Procedure. We do not reach that question. Since the document was not marked for identification and is not a part of the record, we do not know what its contents are. It is therefore impossible, as stated by the court below, to determine whether the statement contained remarks which might serve to impeach the witness. Accordingly, we cannot say that the ruling was prejudicial even if we assume it was erroneous. Mere "technical errors" which do not "affect

the substantial rights of the parties" are not sufficient to set aside a jury verdict in an appellate court. 40 Stat. 1181, 28 U. S. C. § 391. He who seeks to have a judgment set aside because of an erroneous ruling carries the burden of showing that prejudice resulted. That burden has not been maintained by petitioners.

III. The final question presented by this case relates to the burden of proving contributory negligence. As we have noted, two of the causes of action were based on the common law and two on a Massachusetts statute. The court without distinguishing between them charged that petitioners had the burden of proving contributory negligence. To this petitioners excepted, likewise without distinguishing between the different causes of action. And again without making any such distinction, petitioners requested the court to charge that the burden was on respondent. This was refused and "an exception noted."

Respondent contends in the first place that the charge was correct because of the fact that Rule 8(c) of the Rules of Civil Procedure makes contributory negligence an affirmative defense. We do not agree. Rule 8(c) covers only the manner of pleading. The question of the burden of establishing contributory negligence is a question of local law which federal courts in diversity of citizenship cases (*Erie R. Co. v. Tompkins*, 304 U. S. 64) must apply. *Cities Service Co. v. Dunlap*, 308 U. S. 208; *Sampson v. Channel*, 110 F. 2d 754. And see *Central Vermont Ry. Co. v. White*, 238 U. S. 507, 512.

Secondly, respondent contends that the courts below applied the rule of conflict of laws which obtains in New York. So far as the causes of action based on the Massachusetts statute are concerned, we will not disturb the holding below that as a matter of New York conflict of laws, which the trial court was bound to apply (*Klaxon Co. v. Stentor Co.*, 313 U. S. 487) petitioners had the burden of proving contributory negligence. That ruling was based on *Fitzpatrick v. International Ry. Co.*, 252 N. Y. 127, which involved an action brought in New York under a statute of the Province of Ontario. That statute gave a plaintiff in a negligence action, though guilty of contributory negligence, a recovery if the defendant was more negligent, the damages being proportioned to the degree of fault imputable to the defendant. The New York Court of Appeals held that the New York courts were justified in applying the Ontario rule, growing out of the

statute, that the burden was on the defendant to show contributory negligence. The Massachusetts statute on which two of the present causes of action were founded makes a railroad corporation liable for its neglect in giving certain signals. It provides that tort damages for injuries or death from collisions at crossings may be recovered where such neglect "contributed" to the injury, "unless it is shown that, in addition to a mere want of ordinary care, the person injured . . . was, at the time of the collision, guilty of gross or wilful negligence, or was acting in violation of the law, and that such gross or wilful negligence or unlawful act contributed to the injury." Mass. Gen. L. (1932) c. 160, § 232. That statute, like the Ontario statute, creates rights not recognized at common law. *Brooks v. Fitchburg & L. St. Ry.*, 200 Mass. 8; *Duggan v. Bay State Street Ry. Co.*, 230 Mass. 370, 381-382; *Sullivan v. Hustis*, 237 Mass. 441, 446; *Lewis v. Boston & Maine R.*, 263 Mass. 87, 91. And in actions under it the burden of proving contributory negligence is on the defendant. *Manley v. Boston & Maine R.*, 159 Mass. 493; *Phelps v. New England R. Co.*, 172 Mass. 98; *McDonald v. New York C. & H. R. Co.*, 186 Mass. 474; *Kenny v. Boston & Maine R.*, 188 Mass. 127. And see Mass. Gen. L. (1932) c. 231, § 85. Moreover, the measure of damages for death is "the sum of not less than five hundred nor more than ten thousand dollars, to be assessed with reference to the degree of culpability of the" railroad. Mass. Gen. L. (1932) c. 229, § 3. We are referred to no New York decision involving the point. The propriety of applying the rule of the *Fitzpatrick* case to the causes of action based on the Massachusetts statute may be arguable. But it is not the type of ruling under *Erie R. Co. v. Tompkins*, *supra*, which we will readily disturb. Where the lower federal courts are applying local law, we will not set aside their ruling except on a plain showing of error.

The question which is raised on the common law counts is more serious. The court below did not distinguish between the conflict of laws rule in a case like the *Fitzpatrick* case and the rule which apparently obtains in cases where the foreign cause of action is not founded on such a statute. It was intimated in the *Fitzpatrick* case (252 N. Y. p. 135) and stated in other cases in New York's intermediate appellate courts (*Wright v. Palmison*, 237 A. D. 22; *Clark v. Harnischfeger Sales Corp.*, 238 A. D. 493, 495) that in the latter situation the burden of proving freedom

from contributory negligence is on the plaintiff. *Fitzpatrick v. International Ry. Co.*, *supra*, p. 134. But we do not reverse and remand the case to the court below so that it may examine and make an appropriate application of the New York law on the common-law counts, for the following reason: As we have noted, petitioners in their exceptions to the charge given and in the requested charge did not differentiate between the causes of action based on the Massachusetts statute and those on the common law. Even if we assume that the charge on the latter was erroneous, we cannot say that the charge was incorrect so far as the statutory causes of action were concerned. Likewise we must assume that it would have been error to give the requested charge on the statutory causes of action even though we accept it as the correct charge on the others. Under these facts a general exception is not sufficient. In fairness to the trial court and to the parties, objections to a charge must be sufficiently specific to bring into focus the precise nature of the alleged error. Where a party might have obtained the correct charge by specifically calling the attention of the trial court to the error and where part of the charge was correct, he may not through a general exception obtain a new trial. See *Lincoln v. Clafin*, 7 Wall. 132, 139; *Beaver v. Taylor*, 93 U. S. 46, 54-55; *Mobile & M. Ry. Co. v. Jurey*, 111 U. S. 584, 596; *McDermott v. Severe*, 202 U. S. 600, 611; *Norfolk & W. Ry. Co. v. Earnest*, 229 U. S. 114, 122; *Pennsylvania R. Co. v. Minds*, 250 U. S. 368, 375. That long standing rule of federal practice is as applicable in this type of case as in others. That rule cannot be avoided here by reason of the requested charge. For, as we have said, it was at most only partially correct and was not sufficiently discriminating.

Affirmed.

A true copy.

Test

Clerk, Supreme Court, U. S.